DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-1351
Title: Steven Alan Levin, Petitioner
v.
United States, et al.
Docketed: May 10, 2012
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (09-16362)
Decision Date: November 23, 2011
Rehearing Denied: February 15, 2012
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
May 8 2012	Petition for a writ of certiorari filed. (Response due June 11, 2012)
Jun 6 2012	Order extending time to file response to petition to and including July 11, 2012.
Jul 11 2012	Brief of respondents United States in opposition filed.
Jul 25 2012	DISTRIBUTED for Conference of September 24, 2012.
Sep 25 2012	Petition GRANTED.
Oct 4 2012	James A. Feldman, Esquire, of Washington, D.C., is invited to brief and argue this case, as amicus curiae, in support of the petitioner.
Oct 15 2012	The time to file the joint appendix and brief of Court-appointed amicus curiae in support of petitioner is extended to and including November 14, 2012.
Oct 15 2012	The time to file respondent's brief on the merits is extended to and including December 17, 2012.
Oct 15 2012	Motion to dispense with printing the joint appendix filed by Court-Appointed amicus curiae in support of petitioner.
Oct 23 2012	Record from U.S.C.A. for 9th Circuit is electronic.-
Oct 23 2012	Record from U.S.C.A. for the District of Guam is electronic.
Oct 29 2012	Motion to dispense with printing the joint appendix filed by Court-Appointed amicus curiae in support of petitioner GRANTED.
Oct 31 2012	SET FOR ARGUMENT ON Tuesday, January 15, 2013
Nov 14 2012	Brief amicus curiae of Court-Appointed amicus curiae in support of petitioner filed.
Dec 17 2012	Brief of respondents United States, et al. filed.
Dec 19 2012	CIRCULATED.
Jan 4 2013	Reply of petitioner Court-Appointed amicus curiae in support of petitioner filed. (Distributed)
Jan 15 2013	Argued. For Court-Appointed amicus curiae in support of petitioner: James A. Feldman, Washington, D. C. For respondent: Pratik A. Shah, Assistant to the Solicitor General.

PETITION FOR WRIT OF CERTIORARI

RECORD
AND
BRIEFS

11-1351

No. _____

Supreme Court, U.S.
FILED
MAY 8 - 2012
OFFICE OF THE CLERK

In the
Supreme Court of the United States

Steven Alan Levin,
Petitioner,

v.

United States of America; Frank M. Bishop, LCDR, MC, USNR 3855; and Robert Wresch,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

Steven Alan Levin, *pro se*

P.O.B. 8201
Agat, Guam
96928 U.S.A.
no telephone
salanlevin@gmail.com
s.levin@yahoo.com

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Questions Presented for Review

10 U.S.C. § 1089 concerns the defense of military medical personnel against claims for tortious acts committed in the scope of employment. It directs that suits may be brought only against the United States under the Federal Tort Claims Act, which waives sovereign immunity.

28 U.S.C. § 2680 (h) of the FTCA excludes some suits, including battery, from its waiver.

Subsection 1089 (e) states, "For purposes of this section, the provisions of section 2680 (h) ... shall not apply to any cause of action arising out of a ... wrongful act ... in the performance of medical ... functions ...."

The particular question presented is whether suit may be brought against the United States for battery committed to a civilian by military medical personnel acting within the scope of employment.

The broader question raises the same issue for the same and other claims against groups of government employees whose defense would fall under similarly worded statutes.

This Court has never addressed these issues.

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Petition for a Writ of Certiorari

I, Steven Levin, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Opinions Below

The panel's opinion of the Court of Appeals (App. 1) is reported at 663 F.3d 1059. The opinion of the Guam District Court (App. 2) is not reported.

Statement of Jurisdiction

The judgment of the Court of Appeals was entered on November 23, 2011. A petition for rehearing was denied on February 15, 2012 (App. 3). 12 U.S.C. § 1254 (1) confers jurisdiction on this Court.

Constitutional and Statutory Provisions

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1. This Court has held that the liberty "specially protected" by the Due Process Clause includes the right to bodily integrity.[1]

Guam law, 10 G.C.A. § 11108, states: "Right of Adult to **Refuse Treatment** as to His Own Person Not Abridged. Nothing contained herein shall be construed to abridge any right of a person eighteen (18) years of age or over to **refuse** to consent to **medical** or surgical **treatment** as to his own person."

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1 *Washington v. Glucksberg*, 521 U.S. 702 at 720 (1997) (citations omitted).

Pertinent parts of The Federal Tort Claims Act (28 U.S.C. §§ 1346 (b), 2671-2680) are:

§ 1346 (b) (1):

> [T]he district courts ... shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for ... personal injury ... caused by the ... wrongful act ... of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act ... occurred.

§ 2671: ... "'Acting within the scope of his office or employment', in the case of a member of the military or naval forces of the United States ... means acting in line of duty."

§ 2679. Exclusiveness of remedy.

....

> (b) (1) The remedy against the United States provided by section[ ] 1346 (b) ... of this title ... is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employ-

ee or the employee's estate is precluded without regard to when the act or omission occurred.

§ 2680. Exceptions.

The provisions of this chapter and section 1346 (b) of this title shall not apply to –

....

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit ....

....

(k) Any claim arising in a foreign country.

Relevant parts of the Gonzalez Act (10 U.S.C. § 1089) are:

Defense of certain suits arising out of medical malpractice

(a) The remedy against the United States provided by section[ ] 1346 (b) ... of title 28 for damages for personal injury ... caused by the negligent or wrongful act or omission of any physician ... or ... other supporting personnel ... of the armed forces ... while acting within the scope of his duties or employment therein or therefor shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician ... or other supporting personnel (or the estate of such person) whose act or omission gave rise to such action or proceeding.

> (e) For purposes of this section, the provisions of section 2680 (h) of title 28 shall not apply to any cause of action arising out of a negligent or wrongful act or omission in the performance of medical ... functions ....

Statement of the Case

I. Brief Factual Background

The Veteran's Administration is my health care provider. They referred me to the eye clinic at the United States Naval Hospital Guam for exams and then cataract surgery.

The day of the surgery, when I was in the operating room with an IV inserted for conscious sedation, I had my first chance to discuss directly with the Navy surgeon, Dr. Bishop, my concerns about some pre-op eye drops that were not given as planned. He later testified that he meets and talks with patients in the ante-room before they enter the OR. I asked to see him in the ante-room, but was told he would see me in the OR after I signed the consent for anesthesia and the IV was inserted.

For several reasons, based on new information learned in the OR, I changed my mind about having the surgery. When they could have harmlessly stopped, I made it clear, at least twice, that I was withdrawing my consent and that I did not want the surgery.

They proceeded nonetheless. Severe corneal edema resulted. Both sides agree continued treatment is needed with uncertain prospects for success.

II. Relevant Proceedings Below

Suit was filed in Guam District Court alleging battery and negligent medical malpractice against Dr. Bishop and the United States. Unopposed, the United States substituted itself for the surgeon, then moved for summary judgment. Unopposed on the issue of negligence, that part was granted because I could not afford the required expert report and testimony.

The battery issue remained. The United States moved to dismiss that for lack of subject-matter jurisdiction because the FTCA, in 2680 (h), excludes battery claims from its waiver of sovereign immunity. The motion was granted.

The dismissal was appealed. The Ninth Circuit panel affirmed and denied a petition for rehearing en banc.

Basis for federal jurisdiction in district court is 28 U.S.C. § 1346 (b) (1).

III. Additional Facts

I offer the following to shed light on the possible horrors the Ninth Circuit panel's opinion might allow if not reversed.

1. Surgery was scheduled twice. For the first, I was asked to sign a consent that would permit an observer and experimentation. I agreed to the observer, presuming teaching purposes, but not to any experimentation. Later, I learned the hospital is not a teaching hospital.

2. Bishop said "they" might not let me have the surgery if I did not sign the consent form as presented.

The first surgery was canceled. The related consent form was not produced in discovery.

3. I got pre-op Ocufen less than planned in a written report. The dose was verbally reduced, and then given even less than that. Ocufen reduces edema.

4. In the OR I was introduced to an observer. Interrogatory answers and depositions either deny or cannot recall her presence. I described her in detail at my deposition.

5. The record shows sedation began twenty minutes before the surgery. It was Versed — classified as a date rape drug because it makes one compliant.

6. After the operation Bishop told me he used very low power for the operation. Another ophthalmologist, who examined me about 3 months after the surgery, said a lot of power was used.

7. Bishop said I might be a good candidate for a surgical technique in development. It would treat the corneal edema I suffered. I asked how he knew about it. He said it was a federally funded project. I later learned, from material supplied by a VA optometrist in Honolulu, that the developing procedure was in the early stages of human trials. Only about eight had been done. In discovery Bishop denied telling me about that procedure.

8. In discovery I supplied a large number of documents. The United States supplied relatively few, all of which I had already provided. Except, Bishop brought to his deposition four of his reports for cataract operations that happened well after mine. I wanted reports of any sort of operations just prior and subsequent to mine in order to compare how

often consent was mentioned. The four reports mentioned consent one or two times each. In addition to the forms I signed, Bishop's report of my surgery mentioned consent five times.

9. His report of my surgery and another report he sent to the Guam VA Clinic note that I am schizophrenic. During Bishop's post-operative care I began sessions with a VA psychiatrist. She has provided a letter that I am not, and never have been, schizophrenic.

10. The anesthesiologist was never deposed even though scheduled.

11. I have made Freedom of Information Act requests to the Navy. All have been denied.

I suggest that some government employees practice a policy of "deny everything, admit nothing, and attack the accuser" when trying to cover up using citizens for experiments without their permission. I may not be a Tuskegee Airman or a sterilized citizen, but suspiciously-conducted, government-sponsored experiments are not unheard of.

Granting a writ of certiorari and reversing the lower court will close a door that would otherwise be open to unconscionable government experiments using unwilling citizens.

Argument

I. The Panel Opinion Sets a Dangerous Precedent.

A. 1089 (e) language is sufficient to make 2680 (h) inapplicable.

The panel's interpretation leaves 2680 (h) applicable and reads 1089 (e) "as an *expression of*

personal immunity from battery claims."[2] They infer that meaning by reading out of context from the Senate Report.[3] Yet, "[i]n the absence of a 'clearly expressed legislative intention to the contrary,' the language of the statute itself 'must ordinarily be regarded as conclusive.'"[4]

If Congress meant to leave 2680 (h) applicable, as the panel infers, Congress would have used different language than they did, or simply excluded subsection (e). If they needed to express the panel's inferred meaning, how simple it would have been to choose words such as "Personal immunity shall extend to ...." The panel infers a meaning not inherent. This Court has expressed its disapproval:

> It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think ... is the preferred result. See *Smith v. United States,* 508 U.S. 223, 247, n. 4, 113 S.Ct. 2050, 2063, 124 L.Ed.2d 138 (1993) (SCALIA, J., dissenting) ("Stretching language in order to write a more effective statute than Congress devised is not an exercise we should indulge in")[5]

1089 (e) makes 2680 (h) inapplicable for purposes of defending military medical personnel. Without the

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2 *Levin v. United States*, 663 F.3d 1059 at 1062 (9th Cir. 2011).

3 S. Rep. No. 94-1264 at 4451 (76 U.S.C.C.A.N. p. 4443).

4 *United States v. James*, 478 U.S. 597 at 606 (1986).

5 *United States v. Granderson*, 511 U.S. 39 at 68, 69 (1994).

application of 2680 (h), the FTCA waives sovereign immunity for battery claims in this case.

B. The panel interpretation is superfluous.

The panel sees "battery" in the words "wrongful act," asserting that 1089 (e) expresses personal immunity against battery claims. Yet, the FTCA in 1346 (b) (1) and 2679 (b) (1) as well as the Gonzalez Act in 1089 (a) provide personal immunity for "wrongful acts." So, according to the panel's interpretation of 1089 (e), it is superfluous. But,

> "meaning should be attributed to each subsection of a statute. See ... 2A C. Sands, Sutherland on Statutory Construction § 46.06, p. 104 rev. 4th ed. 1984 ("A statute should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant") (footnotes omitted)."[6]

Because the panel's interpretation of 1089 (e) renders it superfluous, their reading must be inaccurate.

C. The *Smith* citation is read out of context.

The panel opinion maintains that 1089 "'functions *solely* to protect military medical personnel from malpractice liability ....' *Smith*, 499 U.S. [160] at 172 (emphasis added)."[7] That excerpt should be read in context. *Smith* is about an exclusion from the FTCA

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6 *United States v. Smith*, 499 U.S. 160 at 183 n. 8 (1991) (citation omitted).

7 *Levin*, 663 F.3d at 1062.

waiver of sovereign immunity because the action took place in a foreign country.[8] There is no abrogation of that exclusion; no equivalent to 1089 (e). So, *Smith* is neither on point nor analogous.

The excerpt occurs in the context of a paragraph rejecting an argument specific to *Smith*. In that paragraph the excerpt is preceded by "For purposes of this case," and followed by "Consequently, ..." The excerpt, thus, was not intended to be pervasively decisive.

The misplaced reliance on that excerpt is necessary to advance the argument that subsection (e) reinforces the "*solely*" functioning purpose of 1089, to insure personal immunity. That assumption overlooks the idea that subsection (e) expresses its own purpose in the ordinary meaning of the words used; a canon of interpretation embraced by this Court.[9]

1089 (e) makes 2680 (h) inapplicable. That is its purpose; one of the purposes of 1089. And,

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice — and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the

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8 *Smith*, 499 U.S. at 162

9 *American Tobacco Co. v. Patterson*, 456 U.S. 63 at 68 (1982).

law.[10]

The Tenth Circuit points out:

> If Congress had wished to leave the government's sovereign immunity undisturbed, it could simply have extended these personal immunities directly, without abrogating the FTCA exclusion contained in §2680 (h). ... [T]he extension of personal immunities in conjunction with the correlative restriction of sovereign immunity is entirely consistent with the overall scheme of immunizing employees indirectly through FTCA *exclusivity* statutes to begin with.[11]

The abrogation of 2680 (h) and the scheme of placing cases under the FTCA indicate a reading of 1089 (e) at odds with the Ninth Circuit's.

D. A judicial doctrine should not trump statutory text.

The courts below contrive an exceedingly narrow application of the doctrine of sovereign immunity's call for an unequivocal waiver. They depend on the primary purpose of 1089 being the only purpose. Yet, when looking at the FTCA, they give little weight to its primary purpose: it allows suits against the government.

It is inconsistent to hold in such high regard

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10 *Rodriguez v. United States*, 480 U.S. 522 at 525-26 (1987) (*per curiam*).

11 *Franklin v. United States*, 992 F.2d 1492 at 1501 (10th Cir. 1993).

1089's primary purpose, but not the FTCA's. And, it is not reasonable to disregard the 1089 purpose of placing cases in defense of military medical personnel under the FTCA. That purpose is to allow redress, not solely to protect the personnel. Nowhere in 1089 language or history is there any indication that Congress intended to eliminate redress for torts that had been available against the personnel. Congress transferred liability. Any congressional candidate campaigning on the panel's interpretation would never be elected.

Furthermore, the intention of Congress, as expressed in the language it uses, should take precedence over a constrictive application of a judicial doctrine. That must follow from an understanding of the separate functions of the branches of government.

And, even considering the doctrine of sovereign immunity, when the text of 1089 declares its primary purpose as "[d]efense of certain suits arising out of medical malpractice," and then puts those suits under the FTCA with the provision that 2680 (h) "shall not apply to any cause of action arising out of a ... wrongful act," — that is unequivocal. The doctrine is satisfied.

The Army teaches that 1089 (e) creates an exception to the 2680 (h) exclusion of the government's immunity waiver. Should the Army change its policy[12] because a few courts below stretch the ad-

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12 Department of the Army Pamphlet 27–162, Legal Services, Claims Procedures, 21 March 2008, pg. 67 ¶ 2-39 h. (1),

mittedly plain meaning of 1089 (e)? Or, as Justice Rehnquist might have said: transmogrify it?

Please do not let the issues fall through the cracks. That could grant permission to future misdeeds — a perilous prospect.

II. Reasons for Granting the Petition

This Court should act to safeguard possible victims by reversing the opinion that would allow military medical personnel a "license" to commit wrongful acts — and to others in government service by parallel statutes — as well as grant immunity to the United States, foreclosing all means of redress.

In this case the wrongful act is an un-consented operation violating local law, common law, and a "constitutionally protected liberty interest in refusing unwanted medical treatment."[13]

The law should be interpreted as a deterrent to violations of that specially-protected liberty interest and as a deterrent to the misdeeds for which Congress allows claims in a series of statutes parallel to 1089.

Those statutes that make 2680 (h) inapplicable in the same manner as 1089 (e) include 10 U.S.C. § 1054 (e)[14] (legal malpractice by employees of the Dept. of Defense); 22 U.S.C. § 2702 (e) (medical mal-

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available at http://www.apd.army.mil/pdffiles/p27_162.pdf (last visited May 1, 2012).

13 *Cruzan by Cruzan v. Director Missouri Dept. of Health*, 497 U.S. 261 at 278 (1990).

14 *Mossow by Mossow v. United States*, 987 F.2d 1365 at 1370 (8th Cir. 1993).

practice by Dept. of State employees); 38 U.S.C. § 7316 (f)[15] (medical malpractice by Dept. of Veterans Affairs employees); and 42 U.S.C. § 233 (e)[16] (medical malpractice by Public Health Service employees)[17].

Because those statutes are similar, the holding of the panel could have far-reaching consequences. Those circuits that have expressed opinions, in holdings and explicit dicta,[18] find that the statutes reinstitute the FTCA waiver of sovereign immunity. The Ninth Circuit, holding otherwise, is alone among the circuits. It is important to resolve the contrary views and establish a just, national norm.

Moreover, letting the issue percolate in the lower courts could countenance military medical battery and other grievous misdeeds. This Court should act

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15 *Franklin*, 992 F.2d at 1499 - 1501.

16 *Lojuk v. Quandt*, 706 F.2d 1456 at 1463 (7th Cir.1983).

17 *Smith*, 499 U.S. at 170 n. 11.

18 *Keir v. United States*, 853 F.2d at 410 (6th Cir. 1988). ("The legislative history of [1089] clearly indicates that it was intended to include a waiver of immunity for malpractice actions even though, under state law, they might technically be characterized as a battery."); *Lojuk*, 706 F.2d at 1463 (7th Cir.) ("[T]he language and legislative history of several similar statutes immunizing a variety of government employees indicates that Congress did not intend to immunize officials from battery claims ... unless the plaintiff had an alternative remedy ... under the FTCA. See, *e.g.* ... 10 U.S.C. 1089 ...."); Franklin, 992 F.2d at 1501 (10th Cir.) ("[T]he effect of [1089(e)] is to insulate the individual government employee by nullifying 2680(h) and thereby expanding the injured party's remedy against the government under the FTCA.")

to guard against that. If the right to bodily integrity is truly "specially protected," let it be so.

And finally, this case is an appropriate vehicle to be treated summarily because the claim is simple. So is the statute to be interpreted. So are its parallels. And, there are no factual nor procedural issues that are directly relevant.

Conclusion

The Court should grant a writ of certiorari and summarily reverse the decision below.

Respectfully submitted,

Steven Levin, *pro se*

P.O.B. 8201
Agat, Guam
96928 U.S.A.
no telephone
salanlevin@gmail.com
s.levin@yahoo.com

Appendix 1

No. 09-16362

In The
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVEN ALAN LEVIN,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA;
FRANK M. BISHOP, LCDR, MC, USNR 3855,
Defendants-Appellees,
and
ROBERT WRESCH,
Movant-Appellee.

Appeal from the United States District Court
for the District of Guam
Frances Tydingco-Gatewood, Chief District Judge,
Presiding

Filed November 23, 2011

Before: Diarmuid F. O'Scannlain,
Richard C. Tallman, and
Milan D. Smith, Jr., Circuit Judges.

Opinion by Judge Tallman

OPINION

After his unsuccessful cataract surgery, Plaintiff-Appellant Steven Levin brought a claim for battery against the United States government and his United States Navy surgeon. The United States invoked the Gonzalez Act, 10 U.S.C. § 1089, immunizing individual military medical personnel from malpractice liability. We consider for the first time in our circuit whether § 1089(e) of the Gonzalez Act waives the government's sovereign immunity for common law battery claims. We hold that it does not, and we affirm the district court's dismissal of Levin's complaint for lack of subject-matter jurisdiction.

I

At some point prior to 2003, Levin was referred to the Ophthalmology Department of the Naval Hospital on Guam for evaluation of a cataract in his right eye. Lieutenant Commander Frank M. Bishop, M.D., performed the evaluation. He suggested a surgical procedure called "phakoemulsification with intraocular lens placement."

After discussing the procedure with Dr. Bishop, Levin gave his informed consent. He signed two consent forms, one entitled "Request for Administration of Anesthesia and for Performance of Operations and Other Procedures," and another entitled "Consent for Anesthesia Service." Dr. Bishop performed the eye surgery in March 2003.

Although Levin had previously given his informed consent to the procedure in writing, he claims he twice attempted orally to withdraw that consent just before the surgery. Levin suffered complications following the procedure, the full extent of which are unclear. Both sides agree that Levin requires continuing treatment and faces uncertain prospects for success.

Levin filed this suit in the United States District Court for the District of Guam, alleging negligent medical malpractice and battery. Levin cited the Federal Tort Claims Act (FTCA) as one of the bases for federal jurisdiction. His complaint named two defendants: Dr. Bishop and the United States. The United States immediately substituted itself for Dr. Bishop, as the Gonzalez Act authorizes.

The parties commenced discovery. Despite many deadline extensions, Levin was unable to come forward with any expert testimony supporting his malpractice claim. At the close of discovery, the United States filed a motion for summary judgment on both the malpractice and battery claims. The district court recognized that, in the absence of expert testimony, there was no triable issue of fact on Levin's malpractice claim. The court thus granted summary judgment on the claim under Federal Rule of Civil Procedure 56. The court denied the United States' motion for summary judgment on the battery claim, however. The court reasoned that a genuine issue of material fact existed as to Levin's consent to the surgery, thus making summary judgment inappropriate.

After being denied summary judgment on the battery claim, the United States altered its strategy. It filed a motion to dismiss the battery claim for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). The United States argued that the district court lacked jurisdiction because the FTCA expressly preserves sovereign immunity against battery claims. The district court agreed and dismissed the battery claim.

Levin appeals only the dismissal of the battery claim; he does not seek review of the negligent malpractice claim. Proceeding *pro se*, he argues that the district court still has jurisdiction to hear his battery claim based on the statutory interplay between the FTCA and the Gonzalez Act.

II

We have jurisdiction under 28 U.S.C. § 1291 and review de novo the district court's dismissal for lack of subject-matter jurisdiction. *See Green v. United States*, 630 F.3d 1245, 1248 (9th Cir. 2011).

III

[1] "The United States, as sovereign, is immune from suit save as it consents to be sued . . . ." *United States v. Sherwood*, 312 U.S. 584, 586 (1941) (citations omitted). Waivers of the government's sovereign immunity "cannot be implied but must be unequivocally expressed." *United States v. King*, 395 U.S. 1, 4 (1969). The Federal Tort Claims Act is one

such unequivocal waiver. *See* 28 U.S.C. §§ 1346, 2671-2680 (2008). The act grants federal courts subject-matter jurisdiction over certain tort actions against the United States. 28 U.S.C. § 1346(b). But the FTCA does not waive sovereign immunity over *all* tort actions. Importantly for this case, the act expressly preserves sovereign immunity against "[a]ny claim arising out of . . . battery." 28 U.S.C. § 2680(h). Levin concedes that this express preservation of sovereign immunity, standing alone, would bar federal jurisdiction over his battery claim. He maintains, however, that the Gonzalez Act waives the sovereign immunity that the FTCA otherwise preserves, and thus calls our attention to the wording of 10 U.S.C. § 1089.

[2] Enacted in 1976, the Gonzalez Act is part of a series of statutes protecting government employees from individual tort liability. *United States v. Smith*, 499 U.S. 160, 170 (1991). The act immunizes military medical personnel by designating remedies against the United States under the FTCA—not lawsuits against individual healthcare providers serving the military—as the exclusive means of recovery for plaintiffs alleging malpractice. 10 U.S.C. § 1089(a) (2008). According to the U.S. Supreme Court, the Gonzalez Act "functions *solely* to protect military medical personnel from malpractice liability . . . ." *Smith*, 499 U.S. at 172 (emphasis added). According to Levin, however, the Gonzalez Act has an additional function: waiving sovereign immunity against battery claims.

[3] Levin centers his argument on a particular subsection of the Gonzalez Act, 10 U.S.C. § 1089(e), which states:

> For purposes of this section, the [FTCA's preservation of immunity against battery claims] shall not apply to any cause of action arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions ....

Id. Levin interprets subsection (e) to *waive* sovereign immunity against battery claims by negating the FTCA's *preservation* of sovereign immunity against battery claims. While this appears to be a viable reading at first blush, a more careful review shows that Levin's argument is untenable for two reasons.

A

First, while we concede that Levin's reading of the Gonzalez Act is plausible, we hold that it is not the best reading of the statute. Statutory interpretation begins with the statute's plain language. *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). Words and phrases must not be read in isolation, but with an eye toward the "purpose and context of the [whole] statute." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006).

[4] Looking at the plain language of subsection (e), we are immediately confronted with its restrictive introductory clause: "For purposes of this section ...."

10 U.S.C. § 1089(e). We have already discussed that the primary purpose of the Gonzalez Act is "to protect military medical personnel from malpractice liability . . . ." *Smith*, 499 U.S. at 172. To be consistent with this purpose, we read subsection (e) not as a *waiver of sovereign immunity* for battery claims brought against the United States, but as an *expression of personal immunity* from battery claims brought against military medical personnel.

[5] It seems clear that the Gonzalez Act makes the FTCA the exclusive remedy for tort actions against military medical personnel. The Gonzalez Act states that "[t]he remedy against the United States" provided by the FTCA excludes "any other civil action or proceeding" against the military healthcare provider. 10 U.S.C. § 1089(a). But because the FTCA provides no "remedy against the United States" for battery, the Gonzalez Act could provide wiggle room for clever tort plaintiffs. A plaintiff could argue that with no "remedy against the United States" for battery, a battery remedy must still exist against his individual military healthcare provider. Subsection (e) is best read to foreclose this argument given congressional protection of military medical personnel against malpractice liability. This interpretation is not only consistent with the purpose of the Gonzalez Act, but also with its legislative history:

> Subsection (e) would nullify a provision of the [FTCA] which would otherwise exclude 33any action for assault and battery from

> the coverage of the [FTCA]. In some jurisdictions it might be possible for a claimant to characterize negligence or a wrongful act as a tort of assault and battery. In this way, the claimant could sue the medical personnel in his individual capacity . . . simply as a result of how he pleaded his case. In short, subsection (e) makes the [FTCA] the exclusive remedy for any action, *including assault and battery*, that could be characterized as malpractice.

S. Rep. No. 94-1264, at 9 (1976) (emphasis added). By "nullifying" the FTCA's preservation of sovereign immunity "for purposes of" the Gonzalez Act, subsection (e) works to protect military medical personnel from artfully pled malpractice claims. We hold it does not waive sovereign immunity.

B

Second, Levin's reading runs counter to well-established guidelines for interpreting waivers of sovereign immunity. As stated above, waivers of sovereign immunity "must be unequivocally expressed." *King*, 395 U.S. at 4. The plaintiff "bears the burden of pointing to such an unequivocal waiver of immunity." *Holloman v. Watt*, 708 F.2d 1399, 1401 (9th Cir. 1983). If the statute that waives sovereign immunity places "limitations and conditions upon the waiver," those limitations are to be "strictly observed and exceptions thereto are not to be implied." *Hodge v. Dalton*, 107 F.3d 705, 707 (9th Cir.

1997) (internal quotation marks omitted) (quoting *Lehman v. Nakshian*, 453 U.S. 156, 160-61 (1981)). When in doubt, courts will "strictly construe[ ]" waivers of sovereign immunity "in favor of the sovereign." *Harger v. Dep't of Labor*, 569 F.3d 898, 903 (9th Cir. 2009) (internal quotation marks omitted) (quoting *Lane v. Pena*, 518 U.S. 187, 192 (1996)).

Levin's reading of the Gonzalez Act, while plausible, does not "point[ ] to . . . an unequivocal waiver of immunity." *Holloman*, 708 F.2d at 1401. To the contrary, his reading builds inference upon inference to reach, at best, an implied waiver. He reasons that if the FTCA's *preservation* of immunity "shall not apply," then a concomitant *waiver* of immunity *shall* apply, even if no such waiver is mentioned anywhere in the Gonzalez Act or its legislative history. This circular reading—where one statute references another statute to reach a result expressed by neither—cannot result in a waiver when nothing short of an unequivocal expression will do. Unfortunately for Levin, the only unequivocal expression in this case is the FTCA's clear preservation of sovereign immunity against "[a]ny claim arising out of . . . battery . . . ." 28 U.S.C. § 2680(h). We must reject implied exceptions to this provision of the FTCA, *Hodge*, 107 F.3d at 707, and therefore decline to adopt Levin's interpretation of the Gonzalez Act.

IV

In arguing that the Gonzalez Act waives sovereign

immunity, Levin relies heavily on the Tenth Circuit's decision in *Franklin v. United States*, 992 F.2d 1492 (10th Cir. 1993). *Franklin* involved a statute very similar to the Gonzalez Act, former 38 U.S.C. § 4116 (now 38 U.S.C. § 7316). This statute protects medical employees of the Veterans Health Administration (VHA) from personal liability. *See* 38 U.S.C. § 7316(a) (2008). The statutory language at issue in *Franklin*, subsection 7316(f), is very similar to subsection (e) of the Gonzalez Act:

> The [FTCA's preservation of immunity against battery] shall not apply to any claim arising out of a negligent or wrongful act or omission of any person described in subsection (a) in furnishing medical care or treatment . . . while in the exercise of such person's duties in or for the [VHA].

38 U.S.C. § 7316(f). The *Franklin* court read this provision the same way Levin reads the Gonzalez Act's subsection (e): as a waiver of sovereign immunity for battery claims. We find the Tenth Circuit's decision in *Franklin* unpersuasive for two reasons.

A

First, the *Franklin* court's interpretation of § 7316, like Levin's interpretation of the Gonzalez Act, ignores the well established principle that waivers of sovereign immunity "cannot be implied but must be unequivocally expressed." *King*, 395 U.S. at 4.

Our sister circuit began its analysis on the right path. It correctly recognized, as we do, that the language of § 7316(f) has the same purpose as subsection (e) of the Gonzalez Act: prohibiting battery claims against individual medical personnel. *Franklin*, 992 F.2d at 1500. Thus, subsection (f), like subsection (e) of the Gonzalez Act, "resolve[s]" the clever-plaintiff problem we discuss above. *Id.* (explaining that because there is "no possible remedy under the FTCA, a cause of action [for battery] against the responsible health worker could be maintained" if not for the protection provided in subsection (f)). We agree that this is the proper, limited interpretation of the subsection's text.

But the *Franklin* court went a step further. It held that subsection (f), in expressing congressional intent to *grant individual* immunity against battery, failed to express legislative intent to *preserve sovereign* immunity against battery. *Id.* (postulating different ways Congress "could have" phrased § 7316(f) to more clearly express its intent that sovereign immunity be preserved). Only if Congress had "indicate[d] more generally" that individual immunity for VHA personnel "was *not* contingent on the existence of a substitute remedy under the FTCA," would the Tenth Circuit leave plaintiffs "without redress." *Id.* (emphasis added). It appears the court thus reasoned that preservations of sovereign immunity—not waivers—must be "unequivocally expressed" in the statute. With respect to our colleagues in *Franklin*, we think this reasoning gets it exactly backwards. It presumes

that a statute waives sovereign immunity simply because it does not clearly state the contrary proposition. Such a presumption would turn our circuit's settled case law on its head, not to mention the Supreme Court's jurisprudence, and we must respectfully reject it.

B

Second, the *Franklin* court reasoned that "extensions of VA personal immunity should be contingent on the government's correlative assumption of FTCA liability." *Id.* Unfortunately for plaintiffs like Levin, the Supreme Court expressly rejected an identical argument in *Smith*. *Smith*, 499 U.S. at 165. In *Smith*, the plaintiff argued that Congress would not have intended to immunize individual officials through the Federal Employees Liability Reform and Tort Compensation Act (FELRTCA) unless the government accepted a corresponding expansion of liability to allow some chance of recovery. *Id.* The Court rejected this quid-pro-quo reasoning. The Court held that the FELRTCA "immunizes Government employees from suit *even when an FTCA exception precludes recovery against the Government*." *Id.* (emphasis added). The Court recognized the harsh consequences of its interpretation but ruled against the tort plaintiff anyway. *Id.* at 166 (conceding that its reading of the FELRTCA could "foreclose a tort plaintiff's recovery altogether").

The Tenth Circuit attempted to distinguish Smith

based on a perceived difference in the statute at issue: "[I]n contrast to [statutes such as § 7316 or the Gonzalez Act], the text and history of the [FELRTCA] reflect no intent to offset personal immunity with government liability." *Franklin*, 992 F.2d at 1501. We find this distinction illusory. We search in vain for language of "intent to offset personal immunity with government liability" anywhere in the text or legislative history of the Gonzalez Act. We therefore reject the Tenth Circuit's quid-pro-quo rationale for expanding liability in *Franklin*, and adhere to the Supreme Court's more limited view of immunity in *Smith*.

V

[6] Because Levin's surgery was performed by Navy personnel, not employees of the VHA, we do not reach his argument that § 7316 applies. The district court properly dismissed Levin's battery claim for lack of subject-matter jurisdiction.

AFFIRMED.

Appendix 2

Civil Case No. 05-00008

In the

UNITED STATES DISTRICT COURT
DISTRICT OF GUAM

STEVEN A. LEVIN,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

ORDER RE: MOTION TO DISMISS, OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

Entered June 3, 2009

This matter came before the court on April 13, 2009 for oral argument on Defendant United States of America's "Motion to Dismiss or, in the Alternative, Motion for Summary Judgment." *See* Docket No. 88. Having heard oral argument, considered the filings and relevant authorities, the court hereby **GRANTS** Defendant's motion to dismiss, for the reasons given below.

I. FACTUAL BACKGROUND

At some time before December 31, 2002, Plaintiff Steven A. Levin ("Plaintiff") was referred to the Ophthalmology Department of the U.S. Naval Hospital on Guam, for evaluation and treatment of a cataract in his right eye. Dr. Frank M. Bishop, M.D., LCDR, United States Navy, did the evaluation. After discussing treatment options with Dr. Bishop, Plaintiff agreed to a procedure described as "phakoemulsification with intraocular lens placement." On December 31, 2002 and again on March 3, 2003, Plaintiff gave informed consent for the surgery. On March 3, 2003, Plaintiff also signed a consent form entitled "Request for Administration of Anesthesia and for Performance of Operations and Other Procedures." Finally, on March 12, 2003, Plaintiff signed a consent form entitled "Consent for Anesthesia Service." *See* Docket No. 75, Exhs. D-F.

On March 12, 2003, Dr. Bishop performed Plaintiff's surgery, at the U.S. Naval Hospital on Guam. Plaintiff claims to have withdrawn his consent to the surgery at least twice—once when he saw the equipment in the operating room, which he states "did not inspire confidence," and another time

after he had been anesthetized with Versed. Docket No. 79 at ¶6. However, the surgery took place. During the surgery, Plaintiff's iris or pupil—the record is conflicting—began to contract. This circumstance required the use of a hook-like "retractor" to keep the aperture open so that the surgery could continue.

After the surgery, Plaintiff suffered "corneal clouding," which Defendant describes as "a known complication of cataract surgery that was discussed with [Plaintiff] during his Informed Consent session with the surgeon." Docket No. 75 at 3:2-4. Plaintiff also claims to have suffered "severe corneal edema, which caused severe pain, some ptosis, disorientation, discomfort and problems with glare and depth of field vision as well as greatly diminished visual acuity." Docket No. 1 at ¶7. Both sides agree that Plaintiff requires continuing treatment, with uncertain prospects for success.

II. PROCEDURAL BACKGROUND

On March 2, 2005, Plaintiff filed a "Complaint for Battery and Negligent Medical Malpractice" in this court. *See* Docket No. 1. The complaint named the United States and Dr. Bishop as co-defendants. *Id.* On May 23, 2005, the United States moved to substitute itself in place of Dr. Bishop. *See* Docket No. 12.[1] Plaintiff did not oppose the proposed

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1 The Federal Employees Liability Reform and Tort Compensation Act (discussed below) provides that "[t]he remedy against the United States" provided by the Federal Tort Claims Act (also discussed below) for the negligence "of any

substitution, and the motion was granted on June 27, 2005. *See* Docket Nos. 13 and 15.

Deadlines were extended several times. *See, e.g.*, Docket Nos. 21, 30, 50, 61, 68. The operative scheduling order was filed on May 9, 2007, setting July 5, 2007 as the deadline for disclosure of expert testimony and August 8, 2007 as the discovery cut-off. *See* Docket No. 72.

On April 20, 2007, Defendant filed a motion for summary judgment, which was dismissed as moot on May 11, 2007. *See* Docket Nos. 56-7, 68.

On October 18, 2007, Defendant filed another motion for summary judgment, which Plaintiff opposed on November 26, 2007. *See* Docket Nos. 74, 75, 78. On September 12, 2008, the court granted the motion for summary judgment as to the medical malpractice claim, but denied it as to the battery claim. *See* Docket No. 84.

On October 9, 2008, Defendant filed the instant

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employee of the Government while acting within the scope of his . . employment is exclusive or any other civil action or proceeding for money damages . . . against the employee." 28 U.S.C. § 2679(b)(1). It further provides that "[a]ny other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee . . . is precluded . . . ." *Id.* Although the statute predicates the substitution of the United States for the individual employee upon certification by the Attorney General that the employee was acting within the scope of this employment at the time of the incident giving rise to the claim, the Attorney General has delegated certifying authority to the United States Attorneys. *See* 28 U.S.C. § 510; 28 C.F.R. § 15.3.

"Motion to Dismiss or, in the Alternative, Motion for Summary Judgment." *See* Docket No. 88. Plaintiff opposed this motion on October 22, 2008. *See* Docket No. 92.[2] On October 30, 2008, Defendant filed a reply to Plaintiff's opposition to the instant motion. *See* Docket No. 94. On January 8, 2009, Plaintiff filed a sur-reply to Defendant's reply, to which Plaintiff responded on January 14, 2009. *See* Docket Nos. 99, 102.

Finally, on March 25, 2009, the parties filed a stipulated motion to extend the time for discovery. *See* Docket No. 106. Magistrate Judge Joaquin V.E. Manibusan, Jr. granted that motion on March 31, 2009. *See* Docket No. 108.

III. APPLICABLE STANDARDS

Defendant has styled its motion as a "Motion to Dismiss or, in the Alternative, Motion for Summary Judgment." *See* Docket No. 88. It cites, as bases for its motion, "Rules 12(b)(1) and 56 of the Federal Rules of Civil Procedure." *Id.* At 1:17-18.

A. Dismissal for Lack of Subject-Matter Jurisdiction Under Fed. R. Civ. P. 2(b)(1)

Federal courts are courts of limited jurisdiction without general subject-matter jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). They can adjudicate only those cases that the Constitution and Congress authorize them to adjudicate. *See id.* In fact, federal courts are

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2 Plaintiff appears to believe—wrongly—that Dr. Bishop "still survives as a defendant in this action." Docket No. 92 at 3.

presumptively *without* subject-matter jurisdiction over civil actions, and the burden of establishing the contrary rests upon the party asserting jurisdiction. *See id.*; *see also Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989).

Since subject-matter jurisdiction is such a fundamental issue, a motion to dismiss for lack thereof may be brought at any stage in the proceedings. *See* Fed. R. Civ. P. 12(h)(3). The vehicle for such a motion is Rule 12(b)(1) of the Federal Rules of Civil Procedure. A Rule 12(b)(1) motion will be granted if, on its face, the complaint fails to allege grounds for federal subject matter jurisdiction as required by Rule 8(a) of the Federal Rules of Civil Procedure. *See Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003); *see also Morrison v. Amway Corp.* 323 F.3d 920, 924 n. 5 (11th Cir. 2003); Schwarzer et al., California Practice Guide: Federal Civil Procedure Before Trial ¶ 9:80 (The Rutter Group 2008).

A Rule 12(b)(1) motion is either "facial" or "factual." *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In a *facial* attack, the challenger asserts that the allegations contained in a complaint are insufficient, on their face, to invoke federal jurisdiction; in a *factual* attack, on the other hand, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction. *See id.* Here, the instant motion is "facial," because Defendant argues that the allegations contained in Plaintiff's complaint are insufficient to invoke federal jurisdiction. *See, e.g.*,

Docket No. 88 at 2:16-17.

Where, as here, the defendant has brought a facial attack, the district court must assume that the factual allegations in the complaint are true and construe them in the light most favorable to the plaintiff. *See United States v. One 1997 Mercedes E420*, 175 F.3d 1129, 1130-31 & n.1 (9th Cir. 1999); *see also Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). However, the court "[is] *not* required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint." *Warren*, 328 F.3d at 1139 (*citing Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9th Cir. 1998)) (emphasis added).

B. Summary Judgment Under Fed. R. Civ. P. 56

Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A "material" fact is "one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit." *T.W. Elec. Service, Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). Thus, a fact's "materiality" is "determined by the substantive law governing the claim or defense." *Id.* The nonmovant cannot rest on conclusory allegations, but must set forth specific facts showing a genuine issue for trial. *See Leer v. Murphy*, 844 F.2d 628, 631 (9th Cir.

1988). Moreover, to defeat a motion for summary judgment, the nonmovant must come forward with evidence sufficient to establish the existence of any disputed element essential to that party's case, and for which that party would bear the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

However, any evidence the nonmovant puts forth is taken as true, and all justifiable inferences from it are drawn in the nonmovant's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). "Thus, the court's ultimate inquiry [on a summary judgment motion] is to determine whether the 'specific facts' set forth by the nonmoving party, coupled with undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence." *T.W. Elec. Service, Inc.*, 809 F.2d at 631.

Finally, when faced with a motion for summary judgment in full, the court is free to render summary judgment in part—that is, to grant the motion as to particular claims for which the Rule 56 standard is met, and to deny it as to others for which the standard is not met. *See* Fed. R. Civ. P. 56(d)(1); *see also Evergreen Int'l v. Marinex Constr'n Co.*, 477 F. Supp. 2d 697, 699 (D.S.C. 2007) ("The 'all or any part' language in Rule 56(a) authorizes the granting of summary judgment with respect to all claims in an action or only some claims in a multiple claim action.").

IV. ANALYSIS

A. The Motion to Dismiss for Lack of

Subject-Matter Jurisdiction Under Fed. R. Civ. P. 12(b)(1) Is Well-Taken

1. Given the doctrine of Sovereign Immunity, Plaintiff's tort claim against the United States is not tenable absent special authorization

"The United States, as sovereign, is immune from suit *save as it consents to be sued* . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Sherwood*, 312 U.S. 584, 586 (1941) (emphasis added). Waivers of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States v. King*, 395 U.S. 1, 4 (1969). Consequently, "waivers of sovereign immunity must be strictly construed . . . ." *Lojuk v. Quandt*, 706 F.2d 1456, 1461 (7th Cir. 1983) (*citing United States v. Mitchell*, 445 U.S. 535, 538 (1980)). "In the absence of clear congressional consent [to waive sovereign immunity], then, 'there is no jurisdiction in [any] court to entertain suits against the United States.'" *Mitchell*, 445 U.S. at 538 (*quoting Sherwood*, 312 U.S. at 587-88)).

2. The Federal Tort Claims Act authorizes *some* tort claims against the United States

A principal waiver of sovereign immunity—and the one at issue in this case—is the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680. The FTCA "provides a remedy for persons injured by the tortious acts of an employee of the United States, where the employee was acting

'within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.'" *Ward v. Gordon*, 999 F.2d 1399, 1401 (9th Cir. 1993) (*quoting* 28 U.S.C. § 1346(b)).

The FTCA contains a number of clearly stated exceptions. Among these is one that preserves the United States' sovereign immunity as to "[a]ny claim arising out of . . . battery." 28 U.S.C. § 2680(h). Thus, it is not possible to bring a battery action against the United States on the basis of the FTCA.

The Federal Employees Liability Reform and Tort Compensation Act ("FELRTCA"), *codified at* 28 U.S.C. § 2679, was enacted in 1988 as an amendment to the FTCA. Among other things, it provides that

> [t]he remedy against the United States provided by [the FTCA] for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is *exclusive of any other civil action or proceeding for money damages* by reason of the same subject matter against the employee whose act or omission gave rise to the claim . . . . *Any other civil action or proceeding* for money damages arising out of or relating to the same subject matter against the employee . . . *is precluded* without regard to when the act

or omission occurred.

Id. § 2679(b)(1) (emphasis added). However, that restriction

> does not extend or apply to a civil action *against an employee of the Government* (A) which is brought for a violation of the Constitution of the United States, or (B) which is brought for a violation of a statute of the United States *under which such action against an individual is otherwise authorized.*

Id. § 2679(b)(2)(A)-(B) (emphasis added).

In sum, the FTCA—as amended by the FELRTCA—makes clear that it is the *sole* basis upon which a plaintiff may vindicate *any* possible civil claims "arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." *Id.* It also makes clear that any such claims—that is, tort claims, as opposed to civil claims for Constitutional or statutory violations—run *only* against the United States, as opposed to individual employees.

3. Plaintiff's particular cause of action is not authorized

a. Plaintiff's cause of action is not authorized under the FTCA

As Plaintiff himself acknowledges, his action is not tenable under the FTCA, because the FTCA "specifically does not extend the federal government's waiver of sovereign immunity to

actions arising out of battery." Docket No. 92 at 1 (*citing* 28 U.S.C. § 2680(h)). Plaintiff cites two other bases for his battery claim against the United States, but neither asserted basis actually authorizes that cause of action.

b. Plaintiff's cause of action is not authorized under 10 U.S.C. § 1089(e)

Plaintiff argues that his cause of action is authorized under Section 1089(e) of Title 10, United States Code. *See* Docket No. 99 at 2.[3] Title 10 deals with the Armed Forces. Section 1089—also known as "The Gonzalez Act"—provides, in pertinent part, that

> [*f*]*or purposes of this section*, the provisions of section 2680(h) of title 28 shall not apply to any cause of action arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions [by various medical personnel of the Armed Forces] (including clinical studies and investigations).

10 U.S.C. § 1089(e) (emphasis added). Plaintiff argues that the "plain language [of this section] permits suits against the United States for battery" by medical personnel of the Armed Forces. Docket

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3 Although Plaintiff set forth his Section 7316(f) argument before his Section 1089(e) argument, the court first analyzes the Section 1089(e) argument because there is more authority that can be brought to bear on that argument; then, given that the language of Section 1089(e) is almost identical to that of 7316(f), the analysis of the Section 1089(e) argument can be brought to bear on the Section 7316(f) argument.

No. 99 at 3. Plaintiff adds that "it is undisputed that the physician in question, Dr. Frank Bishop, at the time of the actions complained [of,] was employed by the armed forces." *Id.*

Plaintiff's argument is *prima facie* plausible, but wrong. Since his argument is essentially that Section 1089(e) is a waiver of sovereign immunity, it bears repeating at the outset that waivers of sovereign immunity "cannot be implied but must be unequivocally expressed," and that "waivers of sovereign immunity must be strictly construed." *King*, 395 U.S. at 4 (1969); *Lojuk*, 706 F.2d at 1461 (*citing Mitchell*, 445 U.S. at 538 (1980)). The court's analysis must begin with, and keep to, this perspective.

It is true that Section 1089 contains language that seems to undo Section 2680(h)'s prohibition on battery claims against the United States: "the provisions of section 2680(h) of title 28 shall not apply to any cause of action arising out of a . . . wrongful act or omission." 10 U.S.C. § 1089(e). Moreover, there are a few cases that take this language—or similar language in analogous statutes—to mean exactly what Plaintiff says it means: that the United States has consented to assume liability for the intentional torts of some of its medical employees. *See Franklin v. United States*, 992 F.2d 1492, 1502 (10th Cir. 1993) (holding that similarly phrased 38 U.S.C. § 4116 (now § 7316) permits battery claim against United States arising from unauthorized surgery performed by Veterans' Administration employee) (discussed further below); *Lojuk*, 706 F.2d at 1461 (suggesting in dicta that 10

U.S.C. § 1089(e) permits battery claims against United States); *Leab v. Chambersburg Hospital*, 230 F.R.D. 395, 396-7 (M.D. Pa. 2005) (holding that similarly phrased 42 U.S.C. § 233(e) permits battery claim against United States arising from unauthorized medical procedure performed by Public Health Service Employee; explicitly following *Franklin* and *Lojuk*); *Andrews v. United States*, 548 F. Supp. 603, 612 (D.S.C. 1982) (holding, but without any analysis, that 10 U.S.C. § 1089(e) permits battery claim against United States arising from sexual abuse by physician's assistant at Naval Weapons Station Branch Clinic).

However, the court is not persuaded by those cases, for several reasons. To begin with the text, the specific language at issue in Section 1089 is clearly qualified by the phrase "for purposes of this section." 10 U.S.C. § 1089(e). Waiving sovereign immunity does not appear to be among the "purposes" of Section 1089. Rather, that section's only apparent purpose is to render medical personnel of the Armed Forces immune from all possible types of malpractice liability. Seen in this light, the meaning of Section 1089(e) becomes evident. Section 1089(a) states that "[t]he remedy against the United States" provided by the FTCA excludes "any other civil action or proceeding by reason of the same subject matter" against the relevant Armed Forces medical worker. 10 U.S.C. § 1089(a). Thus, the scope of Section 1089(a)'s immunity grant is *defined as a function of available remedies under the FTCA*: it essentially says, "Whatever remedies are available against the United States under the FTCA are excluded, and

hence *unavailable* against an individual Armed Forces medical worker." Then, since the FTCA disallows intentional tort claims (including battery claims) against the United States, *see* 28 U.S.C. § 2680(h), it could be argued that the plain language of Section 1089(a) leaves open the possibility of bringing such claims against individual Armed Forces medical workers: a plaintiff could argue, "I *do not* have a remedy against the United States for battery under the FTCA, so there is no relevant 'remedy against the United States' for purposes of Section 1089(a), so I *do* have a remedy against the individual Armed Forces medical worker for battery." Section 1089(e) specifically forecloses this possibility by stating, in effect, that when determining what remedies against an individual Armed Forces medical worker are *unavailable* in virtue of being *available* against the United States under the FTCA, it is to be assumed that a remedy against the United States for intentional torts is available under the FTCA, but *only* in order to bolster the medical worker's protection—that is, *only* "for purposes of this section." 10 U.S.C. § 1089(e).

This reading of the text is strongly supported by (1) other cases construing Section 1089, and (2) the law's legislative history. With regard to the cases, the Supreme Court has held that "[t]he Gonzalez Act [*i.e.*, Section 1089] functions *solely* to protect military medical personnel from malpractice liability; it *does not create rights in favor of malpractice plaintiffs*." *United States v. Smith*, 499 U.S. 160, 172 (1991) (emphasis added). That holding—that the Gonzalez Act "does not create

rights in favor of malpractice plaintiffs"—entirely disposes of Plaintiff's argument, *if* battery may be construed as a species of malpractice. *See also Ward v. Gordon*, 999 F.2d 1399, 1401-02 (9th Cir. 1993) (Section 1089 "provides that a suit against the United States under the FTCA is the exclusive remedy for torts committed by military medical personnel acting within the scope of their government employment" and "does not create rights in favor of malpractice claimants; rather, it serves solely to protect military medical personnel from malpractice liability") (*citing Smith*, 499 U.S. at 169-72); *Pelphrey v. United States*, 674 F.2d 243, 246 (4th Cir. 1982) (finding that "[t]here is nothing in the language of Section 1089 to suggest that Congress intended to expand coverage under the FTCA."); *Jordan v. United States*, 749 F. Supp. 810, 813 (W.D. Okla. 1990), *declined to follow by Franklin*, 992 F.2d at 1501; *Bembenista v. United States*, 676 F. Supp. 18, 21 (D.D.C. 1988), *rev'd in part on other grounds*, 866 F.2d 493 (D.C. Cir. 1989).

On the issue of construing battery as a species of malpractice, *Bembenista* and *Jordan* are particularly useful, despite their slightly impaired status as precedent.[4] In *Bembenista*, the plaintiff had sued the United States for battery arising out of her sexual molestation by a medical technician assigned to care

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4 *Bembenista* was reversed in part only because the military hospital had negligently violated its "heightened" duty to protect the plaintiff from the injurious acts of third persons. 866 F.2d at 498. *Jordan* was mentioned in a "*contra*" citation in *Franklin*, but not overruled. *Franklin*, 992 F.2d at 1501.

for her while she was treated at an Army medical center. *Bembenista*, 676 F. Supp. at 19. She argued that she could maintain this claim because "[Section] 2680(h)'s exclusion of assaults (and certain other intentional torts) from the FTCA's otherwise general waiver of sovereign immunity for negligence is itself subject to an exception when a so-called 'assault' occurs in a medical context." *Id.* at 20. The court rejected this argument, finding it

> manifest . . . from both the legislative history of 10 U.S.C. § 1089, and cases construing FTCA exceptions in analogous contexts, that the *only* purpose of the Medical Malpractice Immunity Act and similar statutes was to relieve government health practitioners of individual personal liability to their patients should they be harmed, by substituting the government as the sole party answerable, *if anyone*, for their *unintended errors, including a failure to obtain a patient's informed consent—technically a "battery" at common law*—in rendering treatment. Section 1089 was *not intended to enlarge in any respect the limited waiver of the government's own sovereign immunity effected by the FTCA.*

Id. at 21 (*citing, inter alia, Malpractice Protection to Defense Medical Personnel: Hearings on S. 1395 and H.R. 3954 Before the Subcomm. on Gen'l Legisl'n of the Senate Comm. on Armed Forces*, 94th Cong. 2d Sess. 68 (1976); S. Rep. No. 94-1264, at 1 (1976) (emphasis added).

Similarly, in *Jordan*, the plaintiffs had sued the United States for battery arising out of treatment at an Air Force medical center. *Jordan*, 740 F. Supp. at 811-12. Dismissing the plaintiffs' battery claim, the court wrote:

> Section 1089(e) of the Medical Malpractice Immunity Act *seemingly* permits a plaintiff to sue the federal government for a claim arising out of assault and battery. The legislative history of the Act indicates, however, that in passing the Act, *Congress simply intended that a claimant be denied the opportunity to proceed individually against a federal medical employee for an assault and battery claim. Congress apparently recognized that a claimant could successfully plead that a negligent or wrongful act constituted assault and battery in order to proceed against the individual employee.* In the section-by-section analysis of the Medical Malpractice Immunity Act, the Senate report states: "In short, subsection (e) makes the Federal Tort Claims Act the exclusive remedy for any action, including assault and battery, that could be characterized as malpractice." The effect of this statutory section, then, was *not* to provide a claimant a right to sue either the government or the individual physician for personal liability as Plaintiffs argue. Rather, *it functioned as an abrogation of a claimant's prior right to sue the physician personally.* Therefore, Plaintiffs are limited to pro-

> ceeding against the government for their assault and battery claim. Moreover, since the United States has not waived its sovereign immunity with respect to the assault and battery claim, this court lacks subject matter jurisdiction to hear the assault and battery claim.

Id. at 813 (citations and footnotes omitted) (emphasis added).

Moreover, the cases holding that the United States *has* consented to assume liability for the intentional torts of some of its medical employees are arguably inconsistent with binding Supreme Court precedent. For example, the *Franklin* court appeared to base its decision in part on a presumption "that extensions of [military medical personnel] immunity should be contingent on the government's correlative assumption of FTCA liability." *Franklin*, 992 F.2d at 1500; *see also id.* at 1501 (speaking of "the extension of personal immunities in conjunction with the correlative restriction of sovereign immunity"). But such *quid pro quo* reasoning was clearly and specifically rejected in *Smith*, where the Court held that "the [FELRTCA] immunizes Government employees from suit *even when an FTCA exception precludes recovery* against the Government." *Smith*, 499 U.S. at 165; *see also id.* at 166 ("The limitations and exceptions' language in § 6 of the [FELRTCA] persuades us that Congress recognized that the required substitution of the United States as the defendant in tort suits filed against Government employees would sometimes foreclose a tort plaintiff's recovery altogether."). Thus, *contra*

Franklin, the Supreme Court has stated that extensions of military medical personnel immunity are *not* contingent on the government's correlative assumption of FTCA liability. Such proscribed reasoning was also a basis of the *Lojuk* and *Leab* cases. *See Lojuk*, 706 F.2d at 1463 ("Congress did not intend to immunize officials from battery claims under subsection (a) unless a plaintiff had an alternative remedy against the United States under the FTCA."); *Leab*, 230 F.R.D. at 397-97 (same). Indeed, the 2005 *Leab* decision (accurately) states that "the *Franklin* decision follows the same type of logic as the Seventh Circuit's *Lojuk* decision." *Id.* at 397. And that "type of logic" was specifically rejected by the Supreme Court in *Smith*.

Moreover, another basis of the *Franklin* court's decision was *Newman v. Soballe*, 781 F.2d 969, 972-72 (11th Cir. 1989), which the Supreme Court had already overruled in *Smith*. *See Franklin*, 992 F.2d at 1501; *Smith*, 499 U.S. at 165 n.7; *see also Nadler v. Mann*, 951 F.2d 301, 305 (11th Cir. 1992) (recognizing *Newman* as "no longer good law" because the Supreme Court had reversed it in *Smith*).

Most fundamentally, the *Franklin* court seemed to start its analysis from the position that any statute *prima facie* appearing to expand sovereign immunity will be held to do so, absent compelling evidence to the contrary. *See, e.g.*, *Franklin*, 992 F.2d at 1501 ("If Congress had wished to leave the government's sovereign immunity undisturbed, it could simply have extended these personal immunities directly, without abrogating the FTCA

exclusion contained in § 2680(h)."). To whatever extent the *Franklin* court took this position, it did so at odds with the strictures that waivers of sovereign immunity "cannot be implied but must be unequivocally expressed," and that "waivers of sovereign immunity must be strictly construed." *King*, 395 U.S. at 4 (1969); *Lojuk*, 706 F.2d at 1461 (*citing Mitchell*, 445 U.S. at 538 (1980)).

In sum, the court finds that the best reading of the case-law indicates that Section 1089 does not roll back the sovereign immunity of the United States, and therefore does not operate as Plaintiff claims it does.[5]

Plaintiff wrongly states that "*Smith* is off point." Docket No. 99 at 4. Specifically, he claims it should not apply here because this court "confronts an exception to an exception," while "*Smith* did not." *Id.* Plaintiff overstates the distinction. While it is true that *Smith*, unlike this case, does not specifically deal with the apparent conflict between 28 U.S.C. § 2680(h) and 10 U.S.C. § 1089(e), the *Smith* Court

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5 The *Smith* Court also characterized Section 1089 as "one of a series of immunity statutes enacted prior to the [FELRTCA] that were designed to protect certain classes of Government employees from the threat of personal liability." *Smith*, 499 U.S. at 170. "Similar pre-immunity statutes were enacted for other medical personnel employed by the Government, including those in the State Department, *see* 22 U.S.C. § 2702, the Veterans' Administration, *see* 38 U.S.C. § 4116, and the Public Health Service, *see* 42 U.S.C. § 233." *Id.* at 170 .11. Since the Court grouped these statutes in this way, it is reasonable to believe that the Court's findings on Section 1089's purpose apply to these other statutes as well.

nonetheless had to pass on the effect of Section 1089 *as a whole*, in order to determine what rights and remedies obtained thereunder, if any. *See Smith*, 499 U.S. at 169-74. For this reason, the Court's statements on the character and effect of Section 1089 are decidedly on-point and binding.

As stated above, Section 1089's legislative history also supports the reading advanced here. The United States Senate describes the purpose of Section 1089 as follows:

> The bill is intended to provide, through *application* of the Federal Tort Claims Act, protection from individual liability to certain medical personnel while acting within the scope of their official duties. In short, defense medical personnel would be immunized from malpractice suits. The bill would eliminate the need of malpractice insurance for all such medical personnel, including physicians, dentists, nurses, and other medical support personnel.

S. Rep. No. 94-1264, at 1 (1976) (emphasis added). This statement speaks of the "application" of the FTCA, rather than its *expansion*, which is what Plaintiff's argument contemplates. More generally, the statement evinces no concern for the remedies available to potential malpractice plaintiffs; rather, the focus is on the immunization of certain military medical personnel, and the cost savings (*via* the elimination of malpractice insurance) that such immunization would entail.

Indeed, these qualities—a focus on the need to

repeatedly stated concerns about costs, since such a rollback would obviously result in increased litigation costs for the United States.

In short, while the text of Section 1089(e) appears to support Plaintiff's argument, it does not actually do so. The relevant case-law and the legislative history bolster this view. Therefore, Section 1089(e) does not authorize Plaintiff's battery claim against the United States.

c. Plaintiff's cause of action is not authorized under 38 U.S.C. § 7316(f)

Plaintiff also argues that his cause of action is authorized under Section 7316(f) of Title 38, United States Code. *See generally* Docket Nos. 92, 99.

Title 38 deals with veterans' benefits. Section 7316 provides, in pertinent part,

> that [t]he exception provided in section 2680(h) of title 28 shall not apply to any claim arising out of a negligent or wrongful act or omission of *any person described in subsection (a)* in furnishing medical care or treatment (including medical care or treatment furnished in the course of a clinical study or investigation) while in the exercise of such person's duties in or for the Administration.

38 U.S.C. § 7316(f) (emphasis added). The relevant "person[s] described in subsection (a)" are "health care employee[s] of the [Veterans'] Administration." *Id.* at § 7316(a)(1).

Plaintiff's cause of action is not authorized under

Section 7316 for at least two reasons. First, that Section applies only to "health care employee[s] of the [Veterans'] Administration." 38 U.S.C. § 7316(a)(1). But as Plaintiff himself states in his complaint, the relevant health care employee in this case "is in the United States Navy." Docket No. 1 at ¶3. *See also* Docket No. 99 at 3 ("[I]t is *undisputed* that the physician in question, Dr. Frank Bishop, at the time of the actions complained [of] *was employed by the armed forces.*") (emphasis added). An employee of the Armed Forces is not an employee of the Veterans' Administration. Even though the court, in evaluating a Rule 12(b)(1) motion, must construe all evidence in the light most favorable to the plaintiff, it must *also* assume that the factual allegations in the complaint are true, and it *cannot* take as true allegations contradicted by evidence in the case. *See Warren*, 328 F.3d at 1139; *One 1997 Mercedes E420*, 175 F.3d at 1130-31 & n.1. Here, the evidence, the complaint, and Plaintiff's own assertions indicate that the relevant medical worker is not an employee of the Veterans' Administration. Thus, Section 7316 is not even applicable.

Second, even if Section 7316 were applicable, it would not authorize Plaintiff's battery claim against the United States, for the same reasons presented in the discussion of Section 1089. As Plaintiff himself states, in reference to Sections 1089(e) and 7316(f): "[c]learly, in substance both sections are identical." Docket No. 99 at 3. *See also Smith*, 499 U.S. at 170 n.11 (characterizing Section 7316 (then Section 4116) and Section 1089 as parts of "a series of immunity statutes enacted prior to the [FELRTCA] that were

designed to protect certain classes of Government employees from the threat of personal liability."). All the points raised in the analysis of the Section 1089 theory of Plaintiff's claim are equally applicable to the analysis of the Section 7316 theory of Plaintiff's claim. Therefore, Section 7316 does not authorize Plaintiff's battery claim against the United States.

B. Summary Judgment Under Fed. R. Civ. P. 56

Since Plaintiff's claim should be dismissed for lack of subject-matter jurisdiction, there is no need to analyze Defendant's motion insofar as it seeks summary judgment in its favor.

V. CONCLUSION

Neither asserted basis of Plaintiff's battery claim waives the United States' sovereign immunity from such claims. Section 1089 does not do so because the best reading of the text, the case law, and the legislative history all indicate that the statute was solely intended to protect Armed Forces medical workers from personal liability—*not* to enable tort plaintiffs to bring claims they could not otherwise bring under the FTCA. Section 7316 does not apply, and even if it did, it should not be read to waive the United States' immunity from battery claims for the same reasons that Section 1089 should not be so read. In short, Plaintiff's complaint, on its face, fails to allege grounds for federal subject matter jurisdiction as required by Rule 8(a) of the Federal Rules of Civil Procedure. Thus, Defendant's motion to dismiss is **GRANTED**.

SO ORDERED.

/s/ Frances M. Tydingco-Gatewood
Chief Judge
Dated: Jun [sic] 3, 2009

UNITED STATES OF AMERICA
DISTRICT COURT OF GUAM

Appendix 3

No. 09-16362

In the
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVEN ALAN LEVIN,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA;
FRANK M. BISHOP, LCDR, MC, USNR 3855,
Defendants-Appellees,
and
ROBERT WRESCH,
Movant-Appellee.

D.C. No. 1:05-cv-00008
District of Guam,
Agana

ORDER

Filed February 15, 2012

Before: O'SCANNLAIN, TALLMAN, and M. SMITH, Circuit Judges.

The panel has voted to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is denied.

OPPOSITION BRIEF

No. 11-1351

In the Supreme Court of the United States

STEVEN ALAN LEVIN, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Acting Assistant Attorney General
THOMAS M. BONDY
DANIEL TENNY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

The waiver of sovereign immunity in the Federal Tort Claims Act (FTCA) contains an exception for intentional torts, including battery. 28 U.S.C. 2680(h). The Gonzalez Act immunizes military medical personnel from claims arising out of the performance of their health care functions by designating the FTCA as the exclusive remedy for such claims. 10 U.S.C. 1089(a).

The question presented is whether the Gonzalez Act amends the FTCA to authorize a battery claim against the United States by providing that the FTCA's intentional-tort exception does not apply "[f]or purposes of [the Gonzalez Act]." 10 U.S.C. 1089(e).

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 663 F.3d 1059. The opinion of the district court (Pet. App. 14a-41a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 2011. A petition for rehearing was denied on February 15, 2012 (Pet. App. 42a-43a). The petition for certiorari was filed on May 8, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Federal Tort Claims Act (FTCA) provides a limited waiver of the government's sovereign immunity for certain tort claims. See 28 U.S.C. 1346(b), 2671-2680. The FTCA contains a number of exceptions. As

relevant here, the FTCA does not waive sovereign immunity for intentional-tort claims, including battery. See 28 U.S.C. 2680(h) ("The provisions of this chapter and section 1346(b) of this title shall not apply to * * * [a]ny claim arising out of * * * battery.").

b. The Gonzalez Act, Pub. L. No. 94-464, § 1(a), 90 Stat. 1985 (1976), immunizes military medical personnel from individual suit by providing that, for claims alleging negligent or wrongful conduct, the FTCA remedy against the United States is "exclusive of any other civil action or proceeding by reason of the same subject matter." 10 U.S.C. 1089(a). As relevant here, the Gonzalez Act further provides

> For purposes of this section [*i.e.*, the Gonzalez Act], the provisions of section 2680(h) of title 28 [*i.e.*, the FTCA's intentional-tort exception] shall not apply to any cause of action arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations).

10 U.S.C. 1089(e).

2. a. Petitioner alleges that he suffered injuries as the result of a cataract surgery performed by a U.S. Navy doctor. Petitioner claims that although he had signed forms consenting to the surgery, he orally withdrew his consent before the surgery began. Pet. App. 3a-4a.

After submitting the requisite administrative claim, see 28 U.S.C. 2675, petitioner sued the United States and the Navy surgeon for negligence and battery in the United States District Court for the District of Guam. The government certified that the surgeon was acting in the scope of his employment, and therefore moved to

substitute the United States as defendant.[1] Petitioner did not oppose the substitution request, and the district court granted it. The district court subsequently granted the government's summary judgment motion on the negligence claim. Pet. App. 3a, 16a-17a.[2]

b. In the ruling at issue here, the district court dismissed the battery claim for lack of subject-matter jurisdiction. Pet. App. 21a-40a. The court started with petitioner's acknowledgment that "his action is not tenable under the FTCA, because the FTCA 'specifically does not extend the federal government's waiver of sovereign immunity to actions arising out of battery.'" *Id.* at 24a-25a (quoting Dist. Ct. Dkt. No. 92, at 1).

The court then rejected petitioner's contention that the Gonzalez Act—in particular, 10 U.S.C. 1089(e)—nevertheless authorizes his battery claim. Pet. App. 25a-38a. Noting that waivers of sovereign immunity must be "unequivocally expressed," the court explained that the Gonzalez Act was not designed to waive the government's sovereign immunity. *Id.* at 26a (quoting *United States* v. *King*, 395 U.S. 1, 4 (1969)). Rather, its "only apparent purpose is to render medical personnel of the Armed Forces immune from all possible types of malpractice liability." *Id.* at 27a. Because Section 2680(h) makes an FTCA remedy for battery claims unavailable against the United States, the court reasoned,

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[1] Under both the Gonzalez Act (10 U.S.C. 1089(c)) and the Westfall Act (28 U.S.C. 2679(d)(1)), if the government certifies that an employee was acting within the scope of his employment when the claim arose, the United States is substituted as defendant and the action is treated as an FTCA action against the United States.

[2] Petitioner did not appeal that portion of the district court's judgment and does not press a negligence claim before this Court. See Pet. 5; Pet. App. 4a.

"it could be argued that the plain language of Section 1089(a) leaves open the possibility of bringing such claims against individual Armed Forces medical workers." *Id.* at 28a. The court explained that Section 1089(e) forecloses that possibility "by stating, in effect, that * * * it is to be assumed that a remedy against the United States for intentional torts is available under the FTCA, but *only* in order to bolster the medical worker's protection—that is, *only* 'for purposes of this section.'" *Ibid.* (quoting 10 U.S.C. 1089(e)).

c. Proceeding pro se,[3] petitioner appealed the dismissal of his battery claim for lack of subject-matter jurisdiction. The court of appeals affirmed. Pet. App. 1a-13a.

The court of appeals, for two reasons, rejected petitioner's interpretation of 10 U.S.C. 1089(e) as negating the FTCA's preservation of sovereign immunity against battery claims. Pet. App. 6a-9a. First, the court concluded that "the best reading" of Section 1089(e) is "not as a *waiver of sovereign immunity* for battery claims brought against the United States, but as an *expression of personal immunity* from battery claims brought against military medical personnel." *Id.* at 7a. The court pointed to the provision's opening clause ("For purposes of this section"), in combination with the Gonzalez Act's primary purpose of protecting military medical personnel from liability. *Id.* at 6a-7a. Against that backdrop, the court explained that Section 1089(e) is best read to foreclose the potential argument that a battery remedy must exist against the individual military healthcare provider because the FTCA provides no

[3] The court of appeals attempted to appoint pro bono counsel for petitioner, but he objected to appointed counsel and the court thus vacated its order appointing counsel. See 7/28/10 C.A. Order.

"remedy against the United States" (10 U.S.C. 1089(a)). Pet. App. 7a. Rather than waiving sovereign immunity, the court reasoned, Section 1089(e) nullifies the FTCA's preservation of sovereign immunity only "for purposes of" the Gonzalez Act, *i.e.*, to preserve military medical personnel's individual immunity from artfully pled malpractice claims, including battery claims. *Id.* at 8a.

Second, the court of appeals concluded that petitioner could not overcome the principle that waivers of sovereign immunity cannot be implied but "must be unequivocally expressed." Pet. App. 8a (quoting *King*, 395 U.S. at 4). The court found that petitioner's reading, at best, suggested an implied waiver of sovereign immunity: that if the FTCA's preservation of immunity "shall not apply," then a concomitant waiver of immunity shall apply. *Id.* at 9a. But such a chain of inferences, the court held, "cannot result in a waiver when nothing short of an unequivocal expression will do." *Ibid.*

The court of appeals also rejected petitioner's reliance on the Tenth Circuit's decision in *Franklin* v. *United States*, 992 F.2d 1492 (1993), which interpreted a similar provision, 38 U.S.C. 7316(f) (former 38 U.S.C. 4116(f) (1988)), as a waiver of sovereign immunity for battery claims premised on conduct of employees of the Veterans Health Administration (VHA). The court stated that *Franklin* incorrectly presumed that a statute waives sovereign immunity simply because it does not clearly state the contrary proposition. Pet. App. 11a-12a. The court further observed that *Franklin*'s reasoning—that "extensions of VA personal immunity should be contingent on the government's correlative assumption of FTCA liability" (992 F.2d at 1500)—was

rejected by this Court in *United States* v. *Smith*, 499 U.S. 160, 165-166 (1991). Pet. App. 12a.[4]

ARGUMENT

Petitioner contends (Pet. 7-13) that the court of appeals erred in holding that 10 U.S.C. 1089(e) does not waive the sovereign immunity of the United States for battery claims arising from healthcare provided by military medical personnel. The decision of the court of appeals, however, is correct. That decision does not directly conflict with any decision of this Court or of another court of appeals, and, in any event, the other decisions cited by petitioner (Pet. 14 n.18) are based on reasoning inconsistent with the Court's decision in *United States* v. *Smith*, 499 U.S. 160 (1991). Further review is not warranted.

1. The decision below is correct. "A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied. Moreover, a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane* v. *Pena*, 518 U.S. 187, 192 (1996) (citations omitted). The FTCA's limited waiver of sovereign immunity for certain tort claims undisputedly does not encompass battery claims. See 28 U.S.C. 2680(h) (providing that FTCA's waiver of sovereign immunity "shall not apply to * * * [a]ny claim arising out of * * * battery"). Accordingly, in order for petitioner to prevail, Section 1089(e) would have to

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[4] The court of appeals rejected petitioner's additional argument that the provision at issue in *Franklin* (38 U.S.C. 7316) governs this case, "[b]ecause [petitioner's] surgery was performed by Navy personnel, not employees of the VHA." Pet. App. 13a. Petitioner does not challenge that aspect of the decision below.

"unequivocally" waive sovereign immunity with respect to petitioner's battery claim. It does not do so.

The Gonzalez Act provides that, in cases involving alleged negligent or wrongful provision of healthcare by military medical personnel, the FTCA "remedy against the United States" is "exclusive of any other civil action or proceeding by reason of the same subject matter." 10 U.S.C. 1089(a). That provision precludes malpractice plaintiffs from suing individual military medical personnel and instead requires them to pursue an FTCA remedy against the United States. Because the FTCA permits a "remedy against the United States" for ordinary medical negligence claims, there is no doubt that Section 1089(a) bars such claims against individual military personnel.

The FTCA, however, affords no remedy for intentional-tort claims, including medical battery claims. See 28 U.S.C. 2680(h). To the extent Section 1089(a) might leave doubt whether its bar on individual liability would extend to medical battery claims, in view of the absence of an FTCA remedy for such claims, Section 1089(e) eliminates that doubt.[5] Section 1089(e) provides: "For purposes of this section, the provisions of section 2680(h) of title 28 shall not apply to any cause of action arising out of a negligent or wrongful act or omission in

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[5] The accompanying Senate Report confirms this concern and Subsection (e)'s role in addressing it: "In some jurisdictions it might be possible for a claimant to characterize negligence or a wrongful act as a tort of assault and battery. In this way, the claimant could sue the medical personnel in his individual capacity * * * simply as a result of how he pleaded his case. In short, subsection (e) makes the [FTCA] the exclusive remedy for any action, including assault and battery, that could be characterized as malpractice." S. Rep. No. 1264, 94th Cong., 2d Sess. 9-10 (1976).

the performance of medical, dental, or related health care functions (including clinical studies and investigations)." By deeming Section 2680(h) inapplicable "[f]or purposes of this section," the Gonzalez Act operates *as if* the FTCA provided a remedy against the United States for battery claims. But it does not take the further step of actually waiving the United States' sovereign immunity to provide one. As the court of appeals concluded (Pet. App. 7a-8a), by assuming the availability of an FTCA remedy "[f]or purposes of this section," Subsection (e) acts in conjunction with Subsection (a) simply to ensure that no military medical provider may be sued individually, even if the claim is pled as an intentional tort.

Petitioner proposes reading Section 1089(e) to actually abrogate Section 2680(h) and thereby make available an FTCA remedy for battery claims arising out of healthcare provided by military medical personnel. But the court of appeals' more restrained reading is better for several reasons. First, as noted above (pp. 7-8, *supra*), Section 1089(e) opens with the phrase "[f]or purposes of this section," which suggests that its treatment of Section 2680(h) is *only* for the purpose of ensuring the individual immunity provided by Section 1089(a), not to alter the broader FTCA scheme. Second, even without that proviso, it would be odd for Congress in the Gonzalez Act to have amended the FTCA—essentially by repealing Section 2680(h) with respect to the type of claim at issue—to provide a new remedy. The Gonzalez Act, a discrete statute, was designed "solely to protect military medical personnel from malpractice liability; it does not create rights in favor of malpractice plaintiffs." *Smith*, 499 U.S. at 172. Third, to the extent Section 1089(e) is at least ambiguous on this question, it cannot

be construed to have "unequivocally" waived the United States' sovereign immunity against petitioner's battery claim and others like it. *Lane*, 518 U.S. at 192. Indeed, Section 1089(e) contains no express waiver of immunity at all.

2. Petitioner cites (Pet. 14 n.18) three courts of appeals cases for the proposition that Section 1089(e) and other similar provisions effectuate a waiver of sovereign immunity. See *Franklin* v. *United States*, 992 F.2d 1492 (10th Cir. 1993); *Keir* v. *United States*, 853 F.2d 398 (6th Cir. 1988); *Lojuk* v. *Quandt*, 706 F.2d 1456 (7th Cir. 1983), cert. denied, 474 U.S. 1067 (1986). The decision below does not conflict with any of them. *Lojuk* and *Keir* address the issue only in dicta, and *Franklin* involves a different statute that is distinguishable by its terms. In any event, those cases rely on reasoning that is inconsistent with the Court's holding in *Smith*, and thus the other circuits should be permitted to reconsider their views in light of *Smith* and the decision below.

a. In *Lojuk*, the Seventh Circuit held that VHA medical personnel are not immune from suit for battery under former 38 U.S.C. 4116(a). 706 F.2d at 1462-1464. In reaching that conclusion, the court compared that statute to several other statutes, including the Gonzalez Act, and opined—in dicta—that Section 1089(e) "waiv[es] the immunity of the United States for battery." *Id.* at 1463; see also Pet. App. 26a-27a (describing *Lojuk* as "suggesting *in dicta* that 10 U.S.C. 1089(e) permits battery claims against United States") (emphasis added). In *Keir*, the Sixth Circuit, in an FTCA case about the scope of Section 2680(h) itself, stated—again in dicta—that Section 1089(e) "was intended to include a waiver of immunity for malpractice actions even though, under state law, they might technically be characterized as a bat-

tery." 853 F.2d at 410 (citing *Lojuk*, *supra*). Even petitioner appears to recognize that the statements in those cases about Section 1089(e) amount only to dicta. See Pet. 14.

In *Franklin*, the Tenth Circuit considered the amended VHA statute, now codified at 38 U.S.C. 7316(f), which states that "[t]he exception provided in section 2680(h) of title 28 shall not apply to any claim arising out of a negligent or wrongful act or omission" by VHA medical personnel. The court held that Section 7316(f) authorized a battery claim against the United States notwithstanding Section 2680(h). *Franklin*, 992 F.2d at 1500-1502; see also *id.* at 1501 (citing, *e.g.*, *Lojuk* and *Keir* in comparing Section 7316(f) to Section 1089(e)). *Franklin* is distinguishable from this case, however, because Section 7316(f) differs from Section 1089(e) in a relevant respect: Section 7316(f) does not include the opening proviso "[f]or purposes of this section," which strongly reinforces the court of appeals' interpretation of Section 1089(e). See pp. 7-8, *supra*. Indeed, the decision below substantially relies on that proviso. See Pet. App. 6a-8a. Moreover, the legislative history of Section 1089(e), on which the decision below also relied, differs significantly from that of Section 7316(f), which the Tenth Circuit considered as supporting its reading. Compare *id.* at 7a-8a with *Franklin*, 992 F.2d at 1500. Accordingly, *Franklin* would not preclude the Tenth Circuit from reaching the same conclusion as the decision below in a case involving the Gonzalez Act.

b. In any event, *Franklin* rests largely on the premise that "extensions of * * * personal immunity should be contingent on the government's correlative assumption of FTCA liability." 992 F.2d at 1500; see also *Lojuk*, 706 F.2d at 1463 ("Congress did not intend to immu-

nize officials from battery claims * * * unless a plaintiff had an alternative remedy against the United States under the FTCA."). In other words, the Tenth Circuit assumed that, to accomplish Congress's goal of immunizing individuals from battery claims, the statute had to permit battery claims against the United States. As the decision below explains (Pet. App. 12a), however, that premise was repudiated in *Smith*. See *Smith*, 499 U.S. at 165 (holding that the Westfall Act, 28 U.S.C. 2679(b)(1), "immunizes Government employees from suit even when an FTCA exception precludes recovery against the Government").[6] Both *Lojuk* and *Keir* were decided before *Smith*, and *Franklin*'s reasoning cannot be reconciled with *Smith*.[7]

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[6] Section 2679(b)(1) provides, in terms analogous to Section 1089(a), that "[t]he remedy" against the United States under the FTCA "is exclusive of any other civil action or proceeding for money damages * * * against the employee." In *Smith*, the plaintiffs claimed to have been injured abroad by a military doctor. 499 U.S. at 162. Because the FTCA contains an exception to its waiver of sovereign immunity for injuries sustained abroad, thus precluding suit against the United States, the plaintiffs sought to proceed against the doctor personally. *Id.* at 162-163; see 28 U.S.C. 2680(k). This Court rejected the plaintiffs' assertion that they must have a remedy either against the employee individually or against the United States, holding that Section 2679(b)(1) bars "recovery against a Government employee" even "where the FTCA itself does not provide a means of recovery." 499 U.S. at 166.

[7] Under the court of appeals' reading, Section 1089(e) is arguably superfluous in light of the Court's holding in *Smith*. Cf. Pet. 9. Under *Smith*, Section 1089(a) alone confers immunity on military medical personnel from all claims (including battery) arising out of medical care, notwithstanding the operation of 28 U.S.C. 2680(h), so Section 1089(e) is presumably unnecessary. But, as the legislative history indicates (see note 5, *supra*), Congress was uncertain of that conclusion at the time the Gonzalez Act was enacted, and thus enacting Section 1089(e) made sense as a matter of caution.

In sum, no court of appeals has considered the text of the Gonzalez Act after *Smith* and reached a result different from the one correctly reached below. No further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Acting Assistant Attorney General
THOMAS M. BONDY
DANIEL TENNY
Attorneys

JULY 2012

RESPONDENT'S BRIEF

No. 11-1351

In the Supreme Court of the United States

STEVEN ALAN LEVIN, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

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FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Principal Deputy Assistant Attorney General
SRI SRINIVASAN
Deputy Solicitor General
PRATIK A. SHAH
Assistant to the Solicitor General
MARK B. STERN
DANIEL TENNY
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

The waiver of sovereign immunity in the Federal Tort Claims Act (FTCA) contains an exception for certain intentional torts, including battery. 28 U.S.C. 2680(h). The Gonzalez Act immunizes military and other covered medical personnel from claims arising out of the performance of their health care functions by designating the FTCA as the exclusive remedy for such claims. 10 U.S.C. 1089(a).

The question presented is whether the Gonzalez Act unequivocally waives sovereign immunity and amends the FTCA to authorize a battery claim against the United States by providing that Section 2680(h) does not apply "[f]or purposes of [the Gonzalez Act]." 10 U.S.C. 1089(e).

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General Tort Bill: Hearing on H.R. 5065 Before a Subcomm. of the House Comm. on Claims, 72d Cong., 1st Sess. (1932) 33
Alexander Holtzoff, *Report on Proposed Federal Tort Claims Bill* (1931) 33
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H.R. Rep. No. 700, 100th Cong., 2d Sess. (1988) 32, 37
House Comm. on Armed Servs., No. 70, 94th Cong., 2d Sess. (1976) 28
W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* (5th ed. 1984) 39, 40
Major Thomas A. Knapp, *Problems of Consent in Medical Treatment*, 62 Mil. L. Rev. 105 (1973) 35
R. Crawford Morris & Alan R. Moritz, *Doctor and Patient and the Law* (5th ed. 1971) 39
Restatement (Second) of Torts (1965) 39
S. 1078, 92d Cong., 1st Sess.(1971) 21
S. Rep. No. 588, 93d Cong., 1st Sess. (1973) 13
S. Rep. No. 1264, 94th Cong., 2d Sess. (1976) 27
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Tort Claims Against the United States: Hearing on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary, 76th Cong., 3d Sess. (1940) 34, 35

In the Supreme Court of the United States

No. 11-1351

STEVEN ALAN LEVIN, PETITIONER

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 663 F.3d 1059. The opinion of the district court (Pet. App. 14a-41a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 2011. A petition for rehearing was denied on February 15, 2012 (Pet. App. 42a-43a). The petition for a writ of certiorari was filed on May 8, 2012, and it was granted on September 25, 2012. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. a. The Federal Tort Claims Act (FTCA) provides a limited waiver of the government's sovereign immunity for tort claims against the United States. See 28

U.S.C. 1346(b), 2671-2680. The FTCA contains a number of exceptions. As relevant here, the FTCA does not waive sovereign immunity for certain intentional-tort claims, including battery. See 28 U.S.C. 2680(h) ("The provisions of this chapter and section 1346(b) of this title shall not apply to * * * [a]ny claim arising out of * * * battery."). That exception was enacted as part of the original FTCA in 1946, and has been amended only once (in 1974) to cabin its scope—specifically, to waive sovereign immunity for a subset of intentional-tort claims arising out of the conduct of federal law enforcement officials. See FTCA, ch. 753, § 421(h), 60 Stat. 846; Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50.

b. The main provision of the Gonzalez Act (Act), Pub. L. No. 94-464, § 1(a), 90 Stat. 1985, states:

> The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel * * * of the armed forces, the National Guard while engaged in training or duty under [specified statutes], the Department of Defense, the Armed Forces Retirement Home, or the Central Intelligence Agency in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of his duties or employment therein or therefor shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such [medical personnel] whose act or omission gave rise to such action or proceeding.

10 U.S.C. 1089(a). Section 1089(a) thus confers personal immunity on military and certain other government medical personnel from tort claims arising out of performance of their healthcare duties by making the FTCA remedy against the United States "exclusive." If covered medical personnel are sued individually, the Act provides, upon certification by the Attorney General that the individual was acting within the scope of employment, for the substitution of the United States as defendant and removal to federal court. 10 U.S.C. 1089(c). In the provision most directly at issue here, the Act further provides

> For purposes of this section, the provisions of section 2680(h) of title 28 shall not apply to any cause of action arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations).

10 U.S.C. 1089(e).

2. a. Petitioner alleges that he suffered injuries as the result of a cataract surgery performed by a United States Navy doctor. Although petitioner provided informed consent and signed consent forms after discussing the surgery with his doctor, he alleges that he orally withdrew his consent in the operating room shortly before the surgery began. Pet. App. 2a-3a, 15a-16a.

b. Petitioner filed an administrative claim with the agency as required by the FTCA, see 28 U.S.C. 2675(a). Because his claim was not favorably resolved in the administrative process, petitioner then sued the United States for negligence and battery in the United States District Court for the District of Guam. Petitioner also named as a defendant the Navy doctor in his individual capacity. The government certified that the doctor was

acting in the scope of his employment, and moved to substitute the United States as defendant, as authorized by both the Gonzalez Act, 10 U.S.C. 1089(c), and the Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly referred to as the Westfall Act), 28 U.S.C. 2679(b)(1). The court granted the unopposed motion. Pet. App. 3a, 16a-17a & n.1.

The district court then granted the government's motion for summary judgment as to petitioner's negligence claim, in light of the absence of any expert evidence that the medical treatment failed to satisfy the relevant standard of care. Pet. App. 3a, 16a-17a. Petitioner did not appeal that ruling. *Id.* at 4a. Accordingly, the only claim remaining in the case is the battery claim against the United States under the FTCA.

c. As to that claim, petitioner argued that, even if the doctor's conduct was not negligent, the operation constituted battery because petitioner had orally withdrawn his consent to surgery. The district court denied the government summary judgment on the battery claim on the ground that a genuine issue of material fact existed based on petitioner's own affidavit. 05-00008 Docket entry (Dist. Ct. Dkt.) No. 84, at 4-5 (Sept. 12, 2008); see Pet. App. 3a, 17a. It ultimately held, however, that the claim was barred by 28 U.S.C. 2680(h) and thus dismissed it for lack of subject matter jurisdiction. Pet. App. 4a, 21a-40a.

The court began by noting petitioner's acknowledgment that "his action is not tenable under the FTCA, because the FTCA 'specifically does not extend the federal government's waiver of sovereign immunity to actions arising out of battery.'" Pet. App. 24a-25a (quoting Dist. Ct. Dkt. No. 92, at 1 (Oct. 22, 2008)). The court then rejected petitioner's contention that the subse-

quently enacted Gonzalez Act—in particular, 10 U.S.C. 1089(e)—nevertheless authorizes his battery claim against the United States. Pet. App. 25a-38a. Noting that waivers of sovereign immunity must be "unequivocally expressed," the court explained that the Gonzalez Act was not designed to waive the government's sovereign immunity. *Id.* at 26a (quoting *United States* v. *King*, 395 U.S. 1, 4 (1969)). Rather, its "only apparent purpose is to render medical personnel of the Armed Forces immune from all possible types of malpractice liability." *Id.* at 27a. Because Section 2680(h) makes an FTCA remedy for battery claims unavailable against the United States, the court reasoned, "it could be argued that the plain language of Section 1089(a) leaves open the possibility of bringing such claims against individual Armed Forces medical workers." *Id.* at 28a. The court explained that Section 1089(e) forecloses that possibility "by stating, in effect, that * * * it is to be assumed that a remedy against the United States for intentional torts is available under the FTCA, but *only* in order to bolster the medical worker's protection—that is, *only* 'for purposes of this section.'" *Ibid.* (quoting 10 U.S.C. 1089(e)).

3. Petitioner appealed the dismissal of his battery claim. The court of appeals affirmed. Pet. App. 1a-13a.

The court of appeals, for two reasons, rejected petitioner's interpretation of 10 U.S.C. 1089(e) as negating the FTCA's preservation of sovereign immunity against battery claims in 26 U.S.C. 2680(h). Pet. App. 6a-9a. First, although acknowledging that petitioner's interpretation is plausible "at first blush," the court concluded that "the best reading" of Section 1089(e) is "not as a *waiver of sovereign immunity* for battery claims brought against the United States, but as an *expression*

of personal immunity from battery claims brought against military medical personnel." *Id.* at 6a-7a. The court pointed to the provision's restrictive opening clause ("For purposes of this section"), in combination with the Gonzalez Act's purpose of protecting military medical personnel from liability. *Ibid.* Against that backdrop, the court explained, Section 1089(e) is best read to foreclose the potential argument that a battery remedy must exist against the individual military healthcare provider because the FTCA provides no "remedy against the United States." *Id.* at 7a (quoting 10 U.S.C. 1089(a)). Rather than go so far as to waive sovereign immunity, the court reasoned, Section 1089(e) disregards the FTCA's preservation of sovereign immunity only "for purposes of" the Gonzalez Act, *i.e.*, to ensure that Section 1089(a) confers immunity on military medical personnel without actually creating an FTCA remedy for malpractice claims pleaded as battery. *Id.* at 8a.

Second, the court of appeals concluded that petitioner could not overcome the principle that waivers of sovereign immunity cannot be implied but "must be unequivocally expressed." Pet. App. 8a (quoting *King*, 395 U.S. at 4). The court found that petitioner's reading, at best, suggested an implied waiver of sovereign immunity: "that if the FTCA's *preservation* of immunity 'shall not apply,' then a concomitant *waiver* of immunity *shall* apply, even if no such waiver is mentioned anywhere in the Gonzalez Act or its legislative history." *Id.* at 9a. Such a "circular reading—where one statute references another statute to reach a result expressed by neither—cannot result in a waiver when nothing short of an unequivocal expression will do." *Ibid.*

The court of appeals also rejected petitioner's reliance on the Tenth Circuit's decision in *Franklin* v. *United States*, 992 F.2d 1492 (1993), which interpreted a different provision, 38 U.S.C. 7316(f) (former 38 U.S.C. 4116(f) (1988)), as a waiver of sovereign immunity for battery claims premised on conduct of healthcare employees of the Veterans Administration (VA). The court stated that *Franklin* incorrectly presumed that a statute waives sovereign immunity simply because it does not clearly state the contrary proposition. Pet. App. 11a-12a. The court further observed that *Franklin*'s reasoning—that "extensions of VA personal immunity should be contingent on the government's correlative assumption of FTCA liability" (992 F.2d at 1500)—was rejected by this Court in *United States* v. *Smith*, 499 U.S. 160, 165-166 (1991). Pet. App. 12a.[1]

SUMMARY OF ARGUMENT

The Gonzalez Act, 10 U.S.C. 1089, does not unequivocally waive sovereign immunity for battery claims against the United States arising out of medical care provided by covered personnel.

A. This Court has repeatedly held that waivers of sovereign immunity "must be 'unequivocally expressed' in statutory text" and that "[l]egislative history cannot supply a waiver that is not clearly evident from" that text. *FAA* v. *Cooper*, 132 S. Ct. 1441, 1448 (2012) (citing, *e.g.*, *Lane* v. *Pena*, 518 U.S. 187, 192 (1996)). Congress will not be deemed to have waived sovereign immunity if

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[1] The court of appeals rejected petitioner's additional argument that the provision at issue in *Franklin* (38 U.S.C. 7316) governs this case, "[b]ecause [petitioner's] surgery was performed by Navy personnel, not employees of the [VA]." Pet. App. 13a. Petitioner does not challenge that aspect of the decision below.

"there is a plausible interpretation of the statute that would not authorize money damages against the Government." *Ibid.* The narrow exception to that strict canon of construction—for interpreting the scope of an FTCA exception in 28 U.S.C. 2680, see, *e.g.*, *Dolan* v. *USPS*, 546 U.S. 481, 492 (2006)—is inapplicable. Here, the Court need not determine the scope of an FTCA exception enacted alongside the FTCA's original waiver of sovereign immunity, but rather must determine whether a subsequent Congress in separate legislation has abrogated the preexisting sovereign immunity undisputedly preserved by Section 2680(h).

B. 1. Particularly in light of the requirement to adopt any plausible reading of a statute that would not waive sovereign immunity, Section 1089(e) is best read simply to assume the inapplicability of Section 2680(h) "[f]or purposes of this section," *i.e.*, the Gonzalez Act. That is, Section 1089(e) calls for acting as if a remedy against the United States were available in order to guard against the negative inference that, if no remedy against the United States were available for a medical battery claim, a remedy against an individual defendant must exist. The government and the Court-appointed amicus supporting petitioner[2] (amicus) agree that Section 1089(e) was enacted to eliminate any doubt that Section 1089(a)'s conferral of individual immunity would extend to medical battery claims, and no one disputes that the government's reading accomplishes that objective.

Amicus reads the text of Section 1089(e), however, to go much further: as actually abrogating Section 2680(h) so as to waive the United States' sovereign immunity for medical battery committed by covered personnel. But

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[2] Petitioner has not filed a separate opening brief on the merits.

Congress would have been expected to express such an intent more clearly given the "unequivocal waiver" requirement. Indeed, Congress did so in the specific context of medical battery claims in a separate statute addressing claims against VA medical personnel. See 38 U.S.C. 7316(f).

Contrary to amicus's argument, neither Section 1089(c) nor Section 1089(f) supports the contention that the Gonzalez Act contemplates a remedy against either the individual or the United States for every alleged tort arising out of covered conduct. Congress did not adopt that either/or approach in the context of the Westfall Act, 28 U.S.C. 2679(b), see *United States* v. *Smith*, 499 U.S. 160, 165-166 (1991); and it did not do so in the Gonzalez Act either. Even if amicus's interpretation of those ancillary provisions were correct, that would only underscore the need for Section 1089(e) as construed by the government: to ensure that covered medical personnel can avail themselves of the personal immunity conferred by Section 1089(a) even when sued under an intentional-tort theory, without at the same time providing an actual FTCA remedy against the United States.

Because this Court's precedents foreclose reliance on legislative history to supply a waiver of sovereign immunity, amicus's discussion of the Gonzalez Act's legislative history is irrelevant. In any event, the snippets amicus cites are in tension with other snippets from the legislative history of both the Gonzalez Act and a parallel provision, 10 U.S.C. 1054.

2. Amicus's reading would create two significant anomalies that Congress would not have intended without saying so far more expressly. First, it would permit an FTCA remedy against the United States if a battery claim were brought against covered medical personnel

individually, but presumably—and incongruously—not if the identical claim were instead brought against the United States under the FTCA directly. Because the Gonzalez Act applies only to tort suits initially brought against individuals, the Act is not implicated in the latter situation and Section 2680(h) thus would still bar the suit.

Second, amicus's reading would create a disparity between plaintiffs bringing a battery claim against covered medical personnel and those bringing an identical claim against other federal medical personnel covered only by Westfall Act. The former would have an FTCA remedy, but, because the subsequently enacted Westfall Act does not include a provision like Section 1089(e), the latter do not. That result would imply that while Congress expanded the waiver of sovereign immunity when enacting the Gonzalez Act and various agency-specific immunity statutes, it later changed course in the Westfall Act and, for the first time, immunized individual federal employees (including Bureau of Prisons (BOP) medical personnel) from tort suits without providing plaintiffs a new FTCA remedy for battery claims. But neither the text nor legislative history of the Westfall Act describes any such departure.

3. In suggesting that Congress could not have intended to bar an FTCA remedy for consent-based claims sounding in intentional tort while permitting one for malpractice claims sounding in negligence, amicus disregards the FTCA's fundamental distinction between intentional torts and negligence embodied in Section 2680(h) itself. As the FTCA's legislative history indicates, Section 2680(h) was designed to protect the United States from liability for certain intentional torts that would be easy to allege but difficult to defend. That

rationale has full salience in the present context, where, unlike ordinary medical negligence claims, lack-of-consent claims for medical battery do not require expert testimony. As the facts of this case demonstrate, such claims can evade summary judgment based solely on a plaintiff's affidavit.

Amicus likewise errs in arguing that variation in state law concerning consent-based torts compels according battery claims the same sovereign immunity waiver applicable to negligence claims. Contrary to amicus's assumption, the determination of whether a consent-based claim arises out of negligence or battery for purposes of Section 2680(h) is a matter of federal law independent of the claim's state-law label. See *United States* v. *Neustadt*, 366 U.S. 696, 705-706 (1961). State laws, moreover, uniformly treated lack (or withdrawal) of consent as battery at the time of the Gonzalez Act's enactment, and informed-consent claims have increasingly been treated as negligence. In any event, any anomaly concerning the treatment of battery claims and negligence claims under the government's reading already exists for claims against other federal medical personnel under the Westfall Act.

ARGUMENT

THE GONZALEZ ACT DOES NOT UNEQUIVOCALLY WAIVE SOVEREIGN IMMUNITY FOR BATTERY CLAIMS AGAINST THE UNITED STATES ARISING OUT OF CARE PROVIDED BY COVERED MEDICAL PERSONNEL

The Gonzalez Act provision at issue, 10 U.S.C. 1089(e), in conjunction with 10 U.S.C. 1089(a), serves a single function: consistent with the Act's overarching purpose, it ensures that military and other covered medical personnel may not be sued in their individual

capacities for conduct within the scope of their employment even if a plaintiff alleges a battery as part of his malpractice claim. Section 1089(a) categorically prohibits tort claims against covered medical personnel acting within the scope of employment by making the remedy against the United States under the FTCA "exclusive." But that provision, without more, could leave a negative inference that certain intentional tort claims that cannot be raised against the United States under the FTCA, see 28 U.S.C. 2680(h), may still be brought individually against covered medical personnel. To eliminate that possibility, Congress enacted Section 1089(e), which renders Section 2680(h) inapplicable only "[f]or purposes of this section," *i.e.*, for purposes of the Gonzalez Act. Section 1089(e) thus makes clear that covered medical personnel are personally immune from suit regardless of the nature of the malpractice claim.

Amicus does not dispute that understanding. But he asserts that Section 1089(e) must be read to go a substantial step further: to waive the government's sovereign immunity by abrogating Section 2680(h)'s exception for battery and related claims arising out of care provided by covered medical personnel. Even if Section 1089(e), standing alone, could be read that way, this Court's precedents require much more: the waiver of sovereign immunity must be "unequivocal," such that no other "plausible" reading exists. *E.g.*, *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 37 (1992). Petitioner cannot satisfy that exacting standard. To the contrary, consistent with the purpose of the Gonzalez Act and the longstanding "intentional tort" exception, Section 1089(e) is better read as *assuming* that a remedy against the United States for intentional torts is available under the FTCA only "[f]or purposes of this sec-

tion," *i.e.*, to ensure the Gonzalez Act's conferral of personal immunity, not actually to abrogate Section 2680(h). Under that reading, sovereign immunity continues to bar petitioner's battery claim against the United States.

A. Section 1089(e) Can Amend The FTCA To Permit Battery Claims Against The United States Only If It Unequivocally Waives Sovereign Immunity Such That No Other Plausible Reading Exists

When Congress enacted the FTCA in 1946, it included an exception for intentional torts—now codified at 28 U.S.C. 2680(h)—that preserved the United States' sovereign immunity from "[a]ny [tort] claim arising out of assault, battery," or any of nine additional specified torts. Since that time, with the single exception of a law-enforcement proviso added to Section 2680(h) in 1974, that congressional preservation of immunity has fully "protect[ed] the Federal Government from liability when its agents commit[] intentional torts." *United States* v. *Shearer*, 473 U.S. 52, 56 (1985) (plurality opinion) (quoting S. Rep. No. 588, 93d Cong., 1st Sess. 3 (1973)) (first brackets in original); see p. 2, *supra*.

Amicus contends that Congress displaced that longstanding preservation of sovereign immunity in the Gonzalez Act by operation of 10 U.S.C. 1089(e). Amicus nevertheless disavows application of the settled legal framework governing waivers of sovereign immunity. That is not surprising: under this Court's established precedents, such waivers are subject to an exacting standard of clarity that Section 1089(e) cannot meet.

1. A waiver of sovereign immunity must be unequivocal by its terms to the exclusion of any other plausible interpretation

As this Court has repeatedly held, and recently reaffirmed, waivers of sovereign immunity "must be 'unequivocally expressed' in statutory text." *FAA* v. *Cooper*, 132 S. Ct. 1441, 1448 (2012) (citing, *e.g.*, *Lane* v. *Pena*, 518 U.S. 187, 192 (1996); *Nordic Village*, 503 U.S. at 33; *Irwin* v. *Department of Veteran Affairs*, 498 U.S. 89, 95 (1990)). "Any ambiguities in the statutory language are to be construed in favor of immunity, so that the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires." *Ibid.* (internal citations omitted). Although an unequivocal waiver does not require Congress to use "magic words," "[a]mbiguity exists if there is a plausible interpretation of the statute that would not authorize money damages against the Government." *Ibid.*; see also *id.* at 1455 n.12 (rejecting "plausible" interpretation of statutory waiver because it was not "unavoidable"); *Nordic Village*, 503 U.S. at 37 (holding that "plausible" alternative readings are "enough to establish that a reading imposing monetary liability on the Government is not 'unambiguous' and therefore should not be adopted").

This Court has also consistently held that "[l]egislative history cannot supply a waiver [of sovereign immunity] that is not clearly evident from the language of the statute." *Cooper*, 132 S. Ct. at 1448 (citing *Lane*, 518 U.S. at 192). Such extrinsic guides to congressional intent ordinarily become relevant when the statutory text is ambiguous. But, in the sovereign-immunity context, statutory text that does not "unambiguous[ly]" waive immunity necessarily forecloses a conclusion of waiver. *Nordic Village*, 503 U.S. at 37. Accordingly, as

long as an otherwise plausible reading of non-waiver exists, "legislative history has no bearing on the ambiguity point." *Ibid.* ("The 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text. If clarity does not exist there, it cannot be supplied by a committee report."); see *id.* at 41 (Stevens, J., dissenting) (acknowledging Court's rejection of legislative history that made Congressional intent to waive sovereign immunity "pellucidly clear").

2. Dolan's narrow exception is inapplicable to this case

Citing *Dolan* v. *USPS*, 546 U.S. 481, 492 (2006), and similar cases involving the scope of other FTCA exceptions, amicus suggests (at 40-43) that he need not identify any unambiguous waiver of sovereign immunity in this case because petitioner's cause of action arises under the FTCA. But the limited exception to the "unequivocal waiver" rule recognized in those cases—concerning the construction of contemporaneously enacted exceptions in the FTCA itself to the FTCA's broad waiver of sovereign immunity—is inapposite here.

In *Dolan*, this Court indicated that the interpretive canon requiring a strict construction of the scope of statutory waivers of immunity does not apply when construing one of the contemporaneously enacted exceptions (set forth in 28 U.S.C. 2680) to the FTCA's waiver of sovereign immunity. The Court reasoned that "unduly generous interpretations of the [FTCA's] exceptions [would] run the risk of defeating the central purpose of the [FTCA]," which "waives the Government's immunity from suit in sweeping language." *Dolan*, 546 U.S. at 491-492 (quoting *Kosak* v. *United States*, 465 U.S. 848, 853 n.9 (1984), and *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 547 (1951)). That rationale does not apply

where, as here, the Court is not asked to evaluate the scope of an original FTCA exception in 28 U.S.C. 2680 enacted alongside the FTCA's waiver of sovereign immunity. There is no dispute that petitioner's battery claim falls within the exception in Section 2680(h). Accordingly, there is no risk of "defeating the central purpose" of the FTCA as reflected in its "sweeping language," *Dolan*, 546 U.S. at 492, because the Congress that enacted the FTCA expressly *preserved* sovereign immunity from such intentional-tort claims, see *Shearer*, 473 U.S. at 56-57 (plurality opinion).

The analytically distinct question now before the Court is whether Section 1089(e), which a different Congress passed to ensure personal immunity for military medical personnel, abrogated the preexisting sovereign immunity preserved in Section 2680(h). In other words, petitioner's position is premised on the notion that the Gonzalez Act creates an additional waiver of sovereign immunity beyond those contained in the FTCA itself. The text of that later enactment must be judged on its own terms and, pursuant to the normal canon, must unequivocally waive sovereign immunity to authorize monetary recovery against the United States. Cf. *Foster* v. *United States*, 522 F.3d 1071, 1079 (9th Cir. 2008) (rejecting application of the *Dolan* interpretive principle to 2000 amendment adding an exception to the FTCA exception in Section 2680(c), because the amendment constitutes a "re-waiver of sovereign immunity" subject to "the general rule that waivers of sovereign immunity are construed in favor of the sovereign").

B. Section 1089(e) Assumes The Inapplicability Of Section 2680(h) Only For Purposes Of Ensuring The Gonzalez Act's Conferral of Personal Immunity

The text and structure of the Gonzalez Act support a reading under which Section 1089(e) serves Congress's goal of ensuring personal immunity by assuming the inapplicability of Section 2680(h) "[f]or purposes of [the Act]" only—a reading that also avoids anomalous results that Congress would not have intended without a more explicit directive. Under the established principles for waivers of sovereign immunity, amicus's contrary reading can prevail only if the *sole* plausible interpretation of Section 1089(e) is that it waives the government's sovereign immunity from suit by actually amending the longstanding "intentional tort" exception in Section 2680(h). Amicus cannot satisfy that high bar.

1. The text, structure, and purpose of the Gonzalez Act support the Government's reading

a. Section 1089(e)'s text, read in light of the Act's purpose, supports the Government's interpretation

The Gonzalez Act confers immunity to covered medical personnel for tort claims arising out of the performance of their healthcare duties by providing that the "remedy against the United States" under the FTCA is "exclusive of any other civil action or proceeding by reason of the same subject matter." 10 U.S.C. 1089(a). The subsidiary provision of the Act on which amicus relies provides that "*[f]or purposes of this section*, the provisions of section 2680(h) of title 28 shall not apply to any cause of action arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies

and investigations)." 10 U.S.C. 1089(e) (emphasis added).

When a provision applies by terms only "[f]or purposes of this section," the content of the provision affects the operation only of the statutory section in which it appears. It should not be read to affect the operation of other statutes found elsewhere in the United States Code, much less a statute involving a waiver of sovereign immunity. Here, Section 1089(e) does not expressly amend the FTCA itself, or otherwise unequivocally expand the recovery available against the United States under the FTCA. Section 1089(e), in conjunction with Section 1089(a), should be read instead as modestly and exclusively serving the Act's undisputed purpose of ensuring that covered medical personnel are accorded personal immunity from all tort suits.

Because the FTCA permits a "remedy against the United States" for ordinary medical negligence claims, no doubt exists that Section 1089(a) bars such claims against individual military personnel. The FTCA, however, affords no remedy against the United States for certain intentional-tort claims, including medical battery claims. See 28 U.S.C. 2680(h). To the extent Section 1089(a) might leave doubt whether its bar to individual liability would extend to medical battery claims, in view of the absence of an FTCA remedy against the United States for such claims, Section 1089(e) eliminates that doubt. For example, if a malpractice claim constituted a claim for battery within the meaning of federal law (see pp. 37-38, *infra*), a plaintiff could have potentially argued—in the absence of Section 1089(e)—that Section 1089(a) did not confer immunity on an individual defendant because no "remedy against the United States" would be available under the FTCA. By deeming Sec-

tion 2680(h) inapplicable "[f]or purposes of" the immunity inquiry under Section 1089(a)—and thus treating the United States as if it were subject to liability—Section 1089(e) forecloses that line of argument.

That concern was not just hypothetical. Before the Gonzalez Act's enactment, the Federal Drivers Act, 28 U.S.C. 2679(b) (1976), by terms nearly identical to those used in Section 1089(a), had made the FTCA remedy against the United States the exclusive remedy for injury resulting from a federal employee's operation of a motor vehicle.[3] Disputes had arisen under that Act regarding whether an action could proceed against an individual federal employee in circumstances in which no FTCA remedy would be available against the United States (because, in suits brought by other federal employees, another statute barred an FTCA action). *See, e.g.*, *Carr* v. *United States*, 422 F.2d 1007, 1011 (4th Cir. 1970); *Van Houten* v. *Ralls*, 411 F.2d 940, 943 (9th Cir.), cert. denied, 396 U.S. 962 (1969); *Vantrease* v. *United States*, 400 F.2d 853, 855 (6th Cir. 1968).

Section 1089(e) ensures that no similar dispute could arise under the Gonzalez Act with respect to intentional-tort claims against covered medical personnel. As the court of appeals concluded (Pet. App. 7a-8a), by assum-

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[3] At that time, the Federal Drivers Act read as follows:

> The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

28 U.S.C. 2679(b) (1976).

ing the availability of an FTCA remedy only "[f]or purposes of this section," Section 1089(e) acts in conjunction with Section 1089(a) to confirm that no military medical provider may be sued individually, even if the claim is one for battery as to which no remedy against the United States exists.

Amicus reads Section 1089(e) to go a substantial step further. Under his reading, Section 1089(e) implements the Act's purpose of ensuring immunity for covered personnel by actually abrogating the intentional-tort exception so to provide an FTCA remedy against the United States for medical battery. In particular, amicus argues (at 14-15) that the introductory clause "[f]or purposes of this section" functions to limit the abrogation of Section 2680(h) to claims arising out of the conduct of military (and specified agency) medical personnel, as opposed to that of other government medical personnel, and not to assume Section 2680(h)'s inapplicability only for purposes of Section 1089(a)'s conferral of personal immunity. Insofar as that is a plausible reading of Section 1089(e)'s introductory clause, it is not the *only* plausible one—which it must be to carry the day given that it would read the provision to effect a waiver of sovereign immunity.

Amicus further argues (at 17-19) that Congress would have used different language, such as "deemed" or "considered," if it had intended Section 1089(e) to treat Section 2680(h) as inapplicable only for the purpose of ensuring Section 1089(a)'s conferral of personal immunity.[4]

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[4] To be sure, Congress could have been more explicit in Section 1089(e) by, *e.g.*, adding the italicized words as follows: "For purposes of this section, *assume that* the provisions of section 2680(h) of title 28 shall not apply to any cause of action arising out of [covered conduct]." But such words are often omitted in common parlance when a

But the same could be said for amicus's reading: Congress would have used different language if it had meant to amend the FTCA to waive sovereign immunity, and thereby expand the liability of the United States, with respect to intentional-tort claims against covered medical personnel. Congress, for example, could have directly amended Section 2680(h) itself—as Congress did in 1974 when it enacted the law-enforcement proviso to waive sovereign immunity for suits against the United States for a subset of intentional tort claims otherwise covered by Section 2680(h) (see p. 2, *supra*).[5]

Indeed, Congress has demonstrated that it can speak more clearly when attempting to abrogate Section 2680(h) in the specific context of medical battery claims. In addition to the Gonzalez Act, Congress has enacted four agency-specific statutes conferring personal immunity on federal medical personnel, and all contain provisions parallel to Section 1089(e). 22 U.S.C. 2702(e);

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hypothetical assumption is intended. For example, someone might say during a moot court: "For purposes of this moot court, I am Justice X." Obviously that does not mean that the speaker has actually become Justice X (or thinks he actually is Justice X); rather, the statement is properly understood to mean "for purposes of the moot court, *assume that* I am Justice X."

[5] As amicus acknowledges (at 29), Congress attempted such an amendment of Section 2680(h) in an earlier proposed bill containing provisions analogous to the Gonzalez Act. S. 1078, 92d Cong., 1st Sess. (1971); see 117 Cong. Rec. 4519 (1971) (proposed bill text: "Section 2680 * * * is amended by striking out the period at the end of paragraph (h) and inserting in lieu thereof a comma and the following: 'except claims within the provisions of [precursor to Section 1089(a)] of title 10 arising out of assault or battery.'"). If enacted, the proposed bill would have accomplished the waiver petitioner now seeks to read into Section 1089(e). But that proposal failed to become law, and the Gonzalez Act cannot be construed to effectuate the waiver that Congress never enacted.

38 U.S.C. 7316(f); 42 U.S.C. 233(e); 51 U.S.C. 20137(e). Three of the provisions contain materially identical language—including the same introductory clause ("[f]or purposes of this section")—to that used in Section 1089(e). See 22 U.S.C. 2702(e); 42 U.S.C. 233(e); 51 U.S.C. 20137(e). The text of the fourth, Section 7316(f), which appears in the statute covering VA medical personnel, differs from the others in a material respect: it omits the introductory clause "[f]or purposes of this section." Instead, it provides that "[t]he exception provided in section 2680(h) of title 28 shall not apply to any claim arising out of a negligent or wrongful act or omission" by VA medical personnel. 38 U.S.C. 7316(f).[6] That provision, enacted after the others in 1988 (Pub. L. No. 100-322, § 203, 102 Stat. 509), directly expresses an intent to abrogate Section 2680(h) for medical battery claims against covered personnel in a manner that the other provisions, including Section 1089(e), do not.

b. The structure of the Gonzalez Act, consistent with the Court's interpretation of the Westfall Act, does not require a remedy in all circumstances

The other provisions of the Gonzalez Act reinforce the conclusion that Section 1089(e) serves solely to further the Act's overarching aim of protecting covered medical personnel from personal liability, and not also to

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[6] Section 7316(f) states in its entirety:

> The exception provided in section 2680(h) of title 28 shall not apply to any claim arising out of a negligent or wrongful act or omission of any person described in subsection (a) in furnishing medical care or treatment (including medical care or treatment furnished in the course of a clinical study or investigation) while in the exercise of such person's duties in or for the Administration.

create a new remedy against the United States for certain intentional torts allegedly committed by those personnel. Relying primarily on Sections 1089(c) and 1089(f), amicus asserts (at 21-26) that the Gonzalez Act generally preserves tort suits against individual employees when an FTCA remedy is unavailable. From that premise, amicus concludes that the Gonzalez Act necessarily contemplates a remedy against either the individual or the United States for every alleged tort arising out of the conduct of covered medical personnel. Both the premise and conclusion are erroneous.

i. As an initial matter, even if amicus's construction of Sections 1089(c) and 1089(f) were correct, it would not help petitioner. Amicus interprets those provisions to contemplate the availability of a remedy against an individual defendant whenever an FTCA exception bars a remedy against the United States. That a covered employee otherwise might be subject to personal liability because an FTCA exception applies, however, only underscores the undisputed purpose of Section 1089(e): to ensure that covered medical personnel can avail themselves of the personal immunity conferred by Section 1089(a) even when sued under an intentional-tort theory. It does not compel the conclusion that Section 1089(e) actually provides an FTCA remedy, rather than just assume one for purposes of Section 1089(a).

For similar reasons, amicus's distinction of the Westfall Act (at 45-47), as construed by this Court in *Smith*, is both mistaken and irrelevant. The Westfall Act, which is applicable to all federal employees, contains essentially the same operative provision as Section 1089(a).[7] In *Smith*, the plaintiffs claimed to have been

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[7] The Westfall Act amended 28 U.S.C. 2679(b) in 1988. See Pub. L. No. 100-694, § 5, 102 Stat. 4564. Section 2679(b)(1) provides, in terms

injured abroad by a military doctor. 499 U.S. at 162. Because the FTCA contains an exception to its waiver of sovereign immunity for injuries sustained abroad, thus precluding suit against the United States, the plaintiffs sought to proceed against the doctor personally. *Id.* at 162-163; see 28 U.S.C. 2680(k). This Court rejected the plaintiffs' assertion, renewed by amicus here, that they must have a remedy either against the employee individually or against the United States. To the contrary, the Court held that the Westfall Act bars "recovery against a Government employee" even "where the FTCA itself does not provide a means of recovery." *Smith*, 499 U.S. at 166; see *id.* at 165 (Section 2679(b)(1) "immunizes Government employees from suit even when an FTCA exception precludes recovery against the Government.").[8]

In the unlikely event the Gonzalez Act were construed to reach the opposite conclusion, however, that would only substantiate the need for Section 1089(e) as interpreted by the government: to assume the availabil-

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analogous to Section 1089(a), that "[t]he remedy against the United States" under the FTCA "is exclusive of any other civil action or proceeding for money damages * * * against the employee."

[8] Amicus notes (at 15-16) that the government's brief in *Smith* expressed the view that Section 1089(e) provides an FTCA remedy against the United States for medical malpractice claims sounding in intentional tort. The government does not adhere to the statements in that brief. The meaning of Section 1089(e) was not at issue in *Smith*, and the Court's statement in *Smith* that the Gonzalez Act "does not create rights in favor of malpractice plaintiffs" (499 U.S. at 172) calls into question the correctness of the statements in the government's brief in that case. Perhaps most notably, the government's brief in *Smith* did not mention the strict construction rule for waivers of sovereign immunity. Application of that rule to Section 1089(e) favors the interpretation pressed by the government in this litigation and accepted by both courts below.

ity of an FTCA remedy "[f]or purposes of [the Gonzalez Act]" and its conferral of personal immunity. Indeed, on the government's theory, Section 1089(e) was enacted out of caution in light of that very possibility.

ii. In any event, amicus's interpretation of Sections 1089(c) and 1089(f) is flawed. Section 1089(c) does not permit an individual tort suit whenever no FTCA remedy exists. Section 1089(c) provides for removal to federal court of a state court suit against a covered individual for claims described in Section 1089(a), but also provides that if a district court determines "that the case so removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State court." 10 U.S.C. 1089(c). The latter "remand" clause does not mean that a state court remedy must be available against a covered individual employee anytime an exception to the FTCA applies or the suit is otherwise barred under the FTCA. That view would significantly undercut the manifest purpose of the Gonzalez Act to protect against personal liability. Under such a reading, covered individuals would be subject to personal liability in any number of circumstances, "including the running of the statute of limitations under the Federal Tort Claims Act." *Vantrease*, 400 F.2d at 855 & n.2. The better interpretation of Section 1089(c)'s remand clause is that it applies only where the district court has determined that the individual was not acting within the scope of his or her employment and thus falls outside the scope of Section 1089(a) itself. See *ibid.* (construing analogous provision of former Federal Drivers Act in same way); *Carr*, 422 F.2d at 1011 (same).

Section 1089(f) similarly does not indicate a lack of personal immunity whenever no FTCA remedy exists.

Section 1089(f)(1) provides that the government may indemnify or insure a covered employee for claims described in Section 1089(a) if the employee is assigned to a foreign country or detailed for service to a non-federal entity, or if circumstances are likely to preclude a FTCA remedy of third parties. 10 U.S.C. 1089(f)(1). Although amicus is correct that indemnification and insurance are necessary only where personal immunity might be inapplicable, amicus fails to appreciate the specific situations enumerated in Section 1089(f)(1): namely, where covered medical personnel are deployed to foreign countries or detailed to non-federal institutions. Providing for indemnification or insurance makes sense in limited circumstances borne out of those situations—*e.g.*, where a military doctor is sued in a foreign court (where Section 1089(a) would be wholly inapplicable) or while working for a non-federal entity (where the conduct might no longer fall "within the scope of [federal] duties or employment" for purposes of Section 1089(a) even if within the scope of his assigned duties). See *United States* v. *Smith*, 499 U.S. 160, 172 n.15 (1991) (noting Section 1089(f) "serves to protect foreign-based military personnel against malpractice suits in *foreign* courts") (citing *Powers* v. *Schultz*, 821 F.2d 295, 297 (5th Cir. 1987)). Relying on the residual prong concerning remedies of third parties, amicus speculates (at 23) that Section 1089(f)(1) extends to *any* "state-law suits against covered medical personnel based on claims that fall within an FTCA exclusion." But that broad reading calls into question the need for Section 1089(e) at all (since covered personnel could be indemnified for intentional tort claims anyway), and it would render superfluous the other two prongs of Section 1089(f)(1) itself.

c. The Act's legislative history cannot supplement the text to effectuate a waiver of sovereign immunity

Amicus's discussion of the legislative history of the Gonzalez Act (at 29-32) is misplaced. As explained above (pp. 14-15, *supra*), this Court has consistently held that "[l]egislative history cannot supply a waiver [of sovereign immunity] that is not clearly evident from the language of the statute." *Cooper*, 132 S. Ct. at 1448 (citing *Lane*, 518 U.S. at 192); see also *Nordic Village*, 503 U.S. at 37. Those precedents foreclose any reliance on the legislative history to discern whether Congress intended to waive the government's sovereign immunity through its enactment of Section 1089(e).

In any event, the legislative history is not as clear as amicus suggests. The bulk of the legislative history merely confirms that the Gonzalez Act was designed to protect covered medical personnel from suit—the singular purpose served by Section 1089(e), in conjunction with Section 1089(a), as construed by the government. The Senate Report accompanying the Gonzalez Act explained that its purpose was to provide "protection from individual liability to certain medical personnel while acting within the scope of their official duties." S. Rep. No. 1264, 94th Cong., 2d Sess. 1 (1976) (*Senate Report*). It observed that "defense medical personnel would be immunized from malpractice suits," which would "eliminate the need of malpractice insurance for all such medical personnel." *Ibid.*

In its discussion of Section 1089(e) specifically, the Senate Report stated (in its entirety): "Subsection (e) would nullify a provision of the [FTCA] which would otherwise exclude any action for assault and battery from the coverage of the [FTCA]. In some jurisdictions it might be possible for a claimant to characterize negli-

gence or a wrongful act as a tort of assault and battery. In this way, the claimant could sue the medical personnel in his individual capacity * * * simply as a result of how he pleaded his case. In short, subsection (e) makes the [FTCA] the exclusive remedy for any action, including assault and battery, that could be characterized as malpractice." *Senate Report* 9-10. That limited discussion does not shed much light on—let alone unequivocally resolve—the key question here: whether Congress intended by virtue of Section 1089(e) simply to ensure personal immunity from medical assault or battery claims (by deeming Section 2680(h) inapplicable only for purposes of the Section 1089(a) inquiry), or also to expand the United States' liability under the FTCA for such claims (by actually abrogating Section 2680(h) to waive sovereign immunity).

Amicus does cite (at 30-32) select snippets at various stages of the legislative process supporting amicus's interpretation of Section 1089(e). But at least one passage, from the chairman (Representative Lucien Nedzi) of the subcommittee that held hearings on the Gonzalez Act and reported to the full House Committee on Armed Services, cuts the other way.[9] Similar statements supporting the government's interpretation exist in the legislative history for the nearly identical statute, 10 U.S.C. 1054 (including a parallel subsection (e)), accord-

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[9] Here is the relevant exchange from the report on full Committee consideration:

> Mr. White: I am sure this goes without saying, but I presume [the bill] does not affect the tort liability of the U.S. Government.
>
> Mr. Nedzi: No; I don't see why it would affect the tort liability. It eliminates the individual liability of the doctors.

House Comm. on Armed Servs., No. 70, 94th Cong., 2d Sess. 8 (1976).

ing personal immunity from tort claims to the legal staff of the Department of Defense. See H.R. Conf. Rep. No. 1001, 99th Cong., 2d Sess. 543 (1986) ("This provision is not intended to create a new cause of action. It is merely intended to provide protection for Department of Defense lawyers similar to that provided for doctors in section 1089 of title 10, United States Code."). Even assuming the legislative history were "pellucidly clear" in amicus's favor, *Nordic Village*, 503 U.S. at 41 (Stevens, J., dissenting), that would not be enough to provide an unequivocal waiver of sovereign immunity absent in the text of Section 1089(e) and, as discussed next, rendered dubious by the consequences flowing from that interpretation.

2. Amicus's interpretation would create anomalous distinctions as to the availability of an FTCA remedy arising out of the provision of medical care

Amicus's reading of Section 1089(e) creates two significant anomalies. First, it would permit an FTCA remedy against the United States if a claim were brought against covered medical personnel individually, but presumably not if the identical claim were instead brought against the United States under the FTCA directly. Second, it would create a disparity between plaintiffs bringing a medical battery claim against covered medical personnel and those bringing an identical claim against other federal medical personnel covered only by the later enacted Westfall Act; the former would have an FTCA remedy but the latter do not. There is no reason to conclude that Congress intended either result unless the statute admits of no other reading.

a. By its terms, the Gonzalez Act applies only to tort suits initially brought against covered medical personnel individually. See 10 U.S.C. 1089(a) (conferring personal

immunity from covered suits); 10 U.S.C. 1089(b) ("The Attorney General shall defend any civil action or proceeding brought in any court against any [covered] person."); 10 U.S.C. 1089(c) (requiring substitution of the United States); 10 U.S.C. 1089(f) (providing for indemnification or insurance for covered individuals who are sued). If the interpretation of Section 1089(e) advocated by amicus were correct, then once the United States is substituted for the individual defendant (see 10 U.S.C. 1089(c)), the United States could not invoke the FTCA's intentional-tort exception as a bar to suit for a medical battery (or other similar) claim.

But if the same plaintiff brought the identical battery claim directly against the United States under the FTCA, the Gonzalez Act is never implicated. In that situation, the FTCA's intentional-tort exception presumably still would be available to the United States as a bar to suit. A plaintiff would have no basis to invoke Section 1089(e), even if construed as petitioner's amicus urges, because that provision applies only "[f]or purposes of this section," *i.e.*, with respect to tort claims brought against covered medical personnel. There is no reason Congress would have desired to accord favored treatment to a claim merely because it once began as a claim against an individual. Put otherwise, Congress would not have wanted to *encourage* suits against covered medical personnel—suits that would be barred and thus futile—but that is presumably the effect of petitioner's interpretation of Section 1089(e).

b. The Gonzalez Act, like other similar statutes predating the Westfall Act (see pp. 21-22, *supra*), confers personal immunity on medical personnel from specified agencies. The Westfall Act extends personal immunity to all federal employees, including medical personnel not

previously covered by those agency-specific statutes (*e.g.*, BOP medical personnel). See 28 U.S.C. 2679(b)(1) (quoted in note 7, *supra*). The Westfall Act, however, does not include a provision like Section 1089(e). To the contrary, the Westfall Act expressly reinforces the applicability of the FTCA's exceptions (including Section 2680(h)) where the United States is substituted for an individual defendant under that Act (which also covers personnel covered by the Gonzalez Act). See 28 U.S.C. 2679(d)(4) ("Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.").

Accordingly, if a suit for medical battery were brought by a plaintiff against BOP medical personnel, the United States would be substituted as a defendant pursuant to the Westfall Act, see 28 U.S.C. 2679(d)(1), and then could invoke the intentional-tort exception in Section 2680(h) to bar the suit. Under petitioner's interpretation of Section 1089(e), the identical claim would proceed against the United States if the underlying care were provided by medical personnel covered under the Gonzalez Act (or by other medical personnel, such as Public Health Service employees, who work alongside BOP medical personnel but are covered under separate immunity statutes, see, *e.g.*, 42 U.S.C. 233). That regime would have the unusual effect of making the availability of recovery under the FTCA depend on the agency employing the responsible medical personnel.

Amicus's position implies that, while Congress expanded the United States' waiver of sovereign immunity when enacting various agency-specific immunity stat-

utes, it later changed course in the Westfall Act and, for the first time, immunized individual federal employees (including, for example, BOP medical personnel) from tort suits without providing plaintiffs a new remedy against the United States for medical battery claims. But neither the text of the Wesftfall Act nor its legislative history provides any hint that Congress believed it was adopting any such departure. Cf. H.R. Rep. No. 700, 100th Cong., 2d Sess. 4 (1988) (House Report accompanying Westfall Act citing the Gonzalez Act as "precedent"). The sounder inference is that Congress had not intended abrogation of Section 2680(h) for medical battery claims under the Gonzalez Act any more than under the Westfall Act.

3. Amicus's policy arguments fail to account for the purpose of Section 2680(h) and its federal definition of excluded claims

Amicus argues (at 33-39) that the Gonzalez Act must treat battery claims the same as negligence claims because (1) "Congress could not have intended to disfavor" plaintiffs alleging consent-based torts, and (2) state laws vary on the proper label for consent-based torts. Neither justification can bear the weight amicus places on it.

a. The rationales underlying Section 2680(h) apply in the medical malpractice context

In suggesting that Congress could not have intended to bar an FTCA remedy for consent-based claims sounding in intentional tort when permitting one for malpractice claims sounding in negligence, amicus fails to grapple with the FTCA's fundamental distinction between intentional torts and negligence embodied in Section 2680(h) itself. The rationales underlying that longstand-

ing FTCA exception remain salient in the present context.

i. The history of Section 2680(h) is instructive. The so-called "intentional tort" exception first appeared in a draft tort claims bill, accompanied by an explanatory report, prepared in 1931 by Special Assistant to the Attorney General Alexander Holtzoff. See *Kosak*, 465 U.S. at 855-857 & nn. 12-13; *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 245-246 (2008) (Breyer, J., dissenting); see also Alexander Holtzoff, *Report on Proposed Federal Tort Claims Bill* (1931) (*Holtzoff Report*). The report contains the following explanation for the intentional-tort exception: "This exception is new. The necessity for it appears obvious on its face. It is required in order to stem a flood of claims of little or no merit, with which the Government might otherwise be confronted. Again, if an exceptionally meritorious claim should arise, recourse could be had to Congress for a special act." *Holtzoff Report* 20. In a 1932 hearing before Congress, Assistant Attorney General Charles B. Rugg provided the following explanation for the proposed exceptions collectively (including the intentional-tort exception): "[W]e have provided a list of 13 exceptions to liability and responsibility of the United States for tort actions. Those were prepared quite thoughtfully after a conference with every department and independent establishment in Washington, and receiving their suggestions, to meet any case where there might be an opportunity for fraudulent and excessive claims and where there was not any genuine moral responsibility on the part of the Government." *General Tort Bill: Hearing on H.R. 5065 Before a Subcomm. of the House Comm. on Claims*, 72d Cong., 1st Sess. 17 (1932).

During a 1940 Senate hearing, Holtzoff offered substantially the same rationale for the intentional-tort exception (which appeared in a subsequent tort claims bill): "Clause 9 proposes to exclude from the cognizance of the law claims arising out of assault, battery, false imprisonment, false arrest, and so forth, a type of torts which would be difficult to make a defense against, and which are easily exaggerated. For that reason it seemed to those who framed this bill that it would be safe to exclude those types of torts, and those should be settled on the basis of private acts." *Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong. 3d Sess. 39 (1940) (*1940 Senate Hearings*); see *Tort Claims Against the United States: Hearings on H.R. 7236 before Subcomm. No. 1 of the House Comm. on the Judiciary*, 76th Cong., 3d Sess. 22 (1940) (describing approach to "take it step by step and exempt certain torts and certain actions which might give rise to tort claims that would be difficult to defend, or in respect to which it would be unjust to make the Government liable") (*1940 House Hearings*); see also *Shearer*, 473 U.S. at 59 (citing Holtzoff's House testimony); *Sheridan* v. *United States*, 487 U.S. 392, 410-411 (1988) (O'Connor, J., dissenting) (citing Holtzoff's Senate and House testimony). The intentional-tort exception appeared in subsequent bills, and was ultimately enacted by Congress as part of the original FTCA in 1946. Ch. 753, § 421(h), 60 Stat. 846.

ii. The considerations informing enactment of Section 2680(h)'s intentional-tort exception in the first place apply equally to the context of medical malpractice. In contrast to ordinary medical negligence claims, which almost always require support by expert testimony, lack

of consent (*i.e.*, medical battery) is "easily exaggerated" and "difficult to defend." *1940 Senate Hearings* 39; *1940 House Hearings* 22; see, *e.g.*, Major Thomas A. Knapp, *Problems of Consent in Medical Treatment*, 62 Mil. L. Rev. 105, 110-111 (1973) ("Unlike the malpractice action based on negligence, expert testimony need not be provided by the plaintiff in a battery action. In the battery action the only issue is whether the patient consented and not whether the doctor reasonably should have informed his patient of the risks involved. A patient may, therefore, rely entirely on nonexpert testimony in a battery action.").

The facts of this case demonstrate that reality. In his complaint, petitioner alleged both that his cataract surgery was performed negligently and that it was performed without his consent. Because petitioner (despite many extensions) was unable to come forward with any expert testimony supporting his negligence claim, the district court granted the government summary judgment on that claim. Pet. App. 3a, 17a. Had petitioner established that the Navy doctor performed the cataract surgery negligently, a burden which he did not come close to meeting, petitioner undisputedly would have had a remedy against the United States under the FTCA.

Instead, petitioner proceeded on his battery claim for lack of consent. As the courts below noted, petitioner, after discussing the cataract procedure with the Navy doctor, provided his informed consent to the procedure on multiple occasions and signed two consent forms to that effect. Pet. App. 2a, 15a. Petitioner nevertheless alleged, comprising one sentence of his complaint, that "[a]fter entering the operating room, before the cataract surgery was commenced, [he] withdrew and revoked his

consent to the surgery." Dist. Ct. Dkt. No. 1, para. 10 (Mar. 2, 2005); see Pet. App. 3a, 15a-16a. Finding a genuine issue of fact based solely on petitioner's affidavit reiterating that allegation, the district court denied summary judgment on the battery claim. *Id.* at 17a; see Dist. Ct. Dkt. No. 84, at 4-5 (relying on petitioner's affidavit stating that "[w]hile [he] initially gave consent for the surgery, [he] withdrew that consent at least twice before surgery commenced") (alterations in original).

Accordingly, as this case shows, a medical battery claim is easy to allege but difficult to disprove—at least without burdensome discovery and perhaps even trial. Rather than depart from the approach it had taken since the FTCA (and its intentional-tort exception) became law in 1946, Congress might well have wished to avoid exposing the government to the specter of liability—and the burdens of defending against it—in such circumstances.

By the same token, amicus's policy objections to application of Section 2680(h) in the medical malpractice context—*i.e.*, that it "eliminate[s] remedies for many of the victims who appeared to be most deserving" and leaves persons "without a remedy for what could be very serious wrongs" (at 34, 39)—also apply to the existence of Section 2680(h) generally. An understanding of Congress's motivations underlying Section 2680(h)—*i.e.*, to protect the government from claims easy to allege but "difficult to defend," and from an employee's intentional departure from basic legal norms for which the government should not be regarded as "moral[ly] responsib[le]" (see pp. 33-34, *supra*)—explains the FTCA's stricter treatment of intentional torts (relative to negligence) committed by federal employees that may seem at first to be counterintuitive. Regardless, Section

2680(h) remains a core component of the FTCA. Indeed, in the Westfall Act, Congress has implemented the very scheme that amicus claims "Congress could not have intended" for other federal medical personnel—allowing malpractice claims sounding in negligence while preserving sovereign immunity for malpractice claims sounding in battery. See pp. 31-32, *supra*; see also H.R. Rep. No. 700, *supra*, at 6 ("[S]uits against Federal employees are precluded even where the United States has a defense which prevents an actual recovery," and in particular "any claim against the government that is precluded by the exceptions set forth in Section 2680 of Title 28, U.S.C. also is precluded against an employee.").

b. Any variation in State law treatment of consent-based claims is insignificant

Amicus's concern about State law distinctions as to whether consent-based claims constitute battery or negligence is both irrelevant and overstated.

i. As a threshold matter, citing 28 U.S.C. 1346(b)(1) (specifying liability "in accordance with the law of the place where the act or omission occurred"), amicus assumes (at 37-39) that whether a particular consent-based claim is treated as a claim arising out of "battery" under Section 2680(h) turns on State law. That assumption is mistaken. The determination of whether such a claim sounds in negligence or battery for purposes of Section 2680(h) is a matter of federal law, which operates independent of the claim's state-law label.

In *United States* v. *Neustadt*, 366 U.S. 696 (1961), the Court held that an FTCA action for "negligent misrepresentation" qualified as a claim "arising out of * * * misrepresentation" and was thus barred by Section 2680(h). The Court deemed it irrelevant "[w]hether or not this analysis accords with the law of States" and

explained it "need not" determine how the relevant State law classified the tort because "whether this claim is outside the intended scope of the [FTCA] * * * depends solely upon what Congress meant by the language it used in [Section] 2680." *Id.* at 705-706 & n.15. The Court stated that Congress would have been aware of the "traditional and commonly understood legal definition of the tort," which governed the interpretation under federal law. *Id.* at 706-707. Accordingly, while it is established that "the extent of the United States' liability under the FTCA is generally determined by reference to state law," *Molzof* v. *United States*, 502 U.S. 301, 305 (1992) (citing, *inter alia*, 28 U.S.C. 1346(b)), the scope of Section 2680(h) is a question of federal law, *Neustadt*, 366 U.S. at 706. The FTCA's exceptions define "the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals," *United States* v. *Varig Airlines*, 467 U.S. 797, 808 (1984), and the interpretation of such federal statutory terms is "by definition a federal question," *Molzof*, 502 U.S. at 305.

There is no dispute here that the type of withdrawal-of-consent claim alleged by petitioner is properly characterized as "arising out of * * * battery" within the meaning of Section 2680(h), and that conclusion would not change even if the underlying State law differed. The arbitrariness that amicus posits is thus illusory. Amicus's suggestion that some other type of consent-based claims (*i.e.*, lack of informed consent) might be subject to different classifications as a matter of State law—without regard to whether those torts would be classified as "battery" for purposes of Section 2680(h)—

provides no basis for exposing the government to liability for the medical battery alleged in this case.

ii. In any event, the State law governing consent-based malpractice claims was fairly uniform at the time of the Gonzalez Act's enactment in 1976 and remains so now. Under common-law doctrine, a medical procedure performed without consent (never given or withdrawn) is a battery. See, *e.g.*, *Mims* v. *Boland*, 138 S.E.2d 902, 906 (Ga. Ct. App. 1964); W. Page Keeton et. al., *Prosser and Keeton on the Law of Torts* (*Prosser and Keeton)* § 18, at 118-119 (5th ed. 1984). Medical mistakes or treatment below the standard of care, by contrast, sounded in negligence. See, *e.g.*, R. Crawford Morris & Alan R. Moritz, *Doctor and Patient and the Law* 326-331 (5th ed. 1971); Restatement (Second) of Torts § 299A (1965). The definition of both types of torts was well settled as of 1976, and there is "no warrant for assuming that Congress was unaware of established tort definitions" when it passed the Gonzalez Act, *Neustadt*, 366 U.S. at 707.

As noted above, lack (or withdrawal) of consent claims have always been treated as battery, and amicus cites only two state court decisions holding otherwise. Amicus Br. 35-36 (citations omitted). Notably, both those States recognized actions for medical battery based on a lack of consent at the time the Gonzalez Act was enacted. See *Beck* v. *Lovell*, 361 So. 2d 245, 249 (La. Ct. App. 1978) ("A surgeon who performs an operation without the consent of a patient, or some authorized person, commits a trespass on the body of the patient, in the nature of a battery."); *Hook* v. *Rothstein*, 316 S.E. 2d 690, 700-701 (S.C. Ct. App. 1984) (similar).

The only type of malpractice claim in any degree of flux at that time was one for lack of informed consent.

The doctrine of "informed consent," under which courts asked whether the plaintiff had consented to a procedure after being made aware of the relevant risks, began developing in the 1950s and 1960s. See *Prosser and Keeton* § 32, at 189-190. The majority of jurisdictions analyzed such claims as negligence claims, asking whether the physician satisfied a reasonable standard of care in the information provided. *Ibid.* (recognizing that while the earliest cases treated informed consent as battery claims, "negligence has now generally displaced battery as the basis for liability" in such suits). As amicus acknowledges, that trend has continued such that only two States now require bringing informed consent claims as battery. Amicus Br. 35 (citations omitted).

To the extent that minimal degree of State-law variation poses any problem, the same problem persists for other medical personnel covered only by the Westfall Act—something that did not deter Congress from preserving Section 2680(h)'s applicability to medical malpractice claims there. See pp. 31-32, *supra*. This Court has recognized, moreover, that even if the interpretation of a statute to effect no waiver of sovereign immunity gives rise to certain anomalies, that is not enough to compel a conclusion of waiver. See *Lane*, 518 U.S. at 196 ("The statutory scheme [under a reading of non-waiver] is admittedly somewhat bewildering. But the lack of perfect correlation in the various provisions does not indicate, as [petitioner] suggests, that the reading proposed by the Government is entirely irrational.").

* * * * *

If this were an ordinary case of statutory interpretation, the Court might struggle with discerning Congress's precise intent in the Gonzalez Act. But it is not. "While [petitioner's] analysis has superficial appeal, it

overlooks [the] critical requirement * * * that [a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied." *Lane*, 518 U.S. at 192 (internal citations omitted).

This Court faced a similar situation in *Nordic Village, supra*. Although the bankruptcy provision at issue in that case,[10] standing alone, was arguably more naturally read to waive sovereign immunity, the Court rejected that reading. See 503 U.S. at 34-37; see also *id.* at 41 (Stevens, J., dissenting) (contending that the "literal text of the Act unquestionably forecloses the defense of sovereign immunity"). The Court relied on the existence of other "plausible" interpretations as defeating the "unequivocal waiver" requirement. It reasoned that under those others readings, the provision, "though not authorizing claims for monetary relief, would nevertheless perform a significant function." *Id.* at 36.

The same is true here. Under the government's reading, Section 1089(e), though not authorizing an FTCA remedy, undisputedly performs the significant function of securing personal immunity for covered medical personnel when a plaintiff alleges a medical

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[10] The relevant provision, Section 106(c) of the Bankruptcy Code, stated:

> Except as provided in subsections (a) and (b) of this section *and notwithstanding any assertion of sovereign immunity*—
>
> (1) a provision of this title that contains "creditor," "entity," or "governmental unit" applies to governmental units; and
>
> (2) a determination by the court of an issue arising under such a provision binds governmental units.

11 U.S.C. 106(c) (1988) (emphasis added).

battery. As this Court has recognized, "[t]he Gonzalez Act functions solely to protect military medical personnel from malpractice liability; it does not create rights in favor of malpractice plaintiffs." *Smith*, 499 U.S. at 172.[11] Under petitioner's reading, however, Section 1089(e) would do just that—without any unequivocal waiver of the government's sovereign immunity with respect to intentional-tort claims.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Principal Deputy Assistant Attorney General
SRI SRINIVASAN
Deputy Solicitor General
PRATIK A. SHAH
Assistant to the Solicitor General
MARK B. STERN
DANIEL TENNY
Attorneys

DECEMBER 2012

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[11] Amicus attempts (at 47-48) to parse the Court's recognition of the Gonzalez Act's singular purpose in *Smith* by asserting that the plaintiff in that case argued that "the Gonzalez Act itself *created* a remedy against the employee," whereas here "the issue is whether Section 1089(e) removes an exception to a remedy created by the FTCA elsewhere." Whether the Gonzalez Act expands liability by creating a new remedy or by abrogating an exception to a previously unavailable remedy does not matter; either one would require an unequivocal waiver of sovereign immunity absent in that Act.

REPLY BRIEF

RECORD AND BRIEFS

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In The Supreme Court of the United States

STEVEN ALAN LEVIN, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF COURT-APPOINTED AMICUS CURIAE JAMES A. FELDMAN IN SUPPORT OF PETITIONER

STEPHANOS BIBAS
NANCY BREGSTEIN GORDON
UNIV. OF PENNSYLVANIA LAW SCHOOL SUPREME COURT CLINIC
3501 SANSOM STREET
PHILADELPHIA, PA 19104

IRVING L. GORNSTEIN
GEORGETOWN UNIV. LAW CENTER
600 NEW JERSEY AVE., N.W.
WASHINGTON, D.C. 20001

JAMES A. FELDMAN
Counsel of Record
5335 WISCONSIN AVE. N.W.
SUITE 440
WASHINGTON, D.C. 20015
(202) 730-1267
WEXFELD@GMAIL.COM

Library of Congress
Law Library

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Within our system of law, a patient who seeks care from a medical professional has the right to control what procedures the professional will, and will not, perform. That right is enforceable by a tort remedy that provides compensation to victims and an incentive for medical professionals not to perform procedures without their patients' consent. The text and structure of the Gonzalez Act demonstrate that Congress did not intend to eliminate all such remedies for patients treated by medical personnel of the armed forces and other specified agencies. No principle of sovereign immunity requires the reading the government would give the Act.

A. Petitioner's Position Is Consistent With Sovereign Immunity Principles

The government argues that the strict standard for waivers of sovereign immunity governs the interpretation of Section 1089(e), and that Section 1089(e) fails to satisfy that standard. Neither contention is correct.

1. The FTCA "waives the Government's immunity from suit in sweeping language." *United States v. Yellow Cab Co.*, 340 U.S. 543, 547 (1951). Accordingly, the construction of the scope of FTCA exceptions does "not implicate the general rule that 'a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign.'" *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 491 (2006) (quoting *Lane v. Pena*, 518 U.S. 187, 192 (1996)). That is because "unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute." *Id.* at 492 (quoting *Kosak v. United States*, 465 U.S. 848, 853

n.9 (1984)); see Amicus Br. 40-42.

That principle applies here. Section 1089(e) expressly refers to the FTCA intentional tort exception, providing that "the provisions of section 2680(h) of title 28 shall not apply." It limits the scope of that exception, removing from its reach cases involving torts committed by the specified medical personnel. It therefore comes within the *Dolan* principle.

2. The government argues that *Dolan* "does not apply where, as here, the Court is not asked to evaluate the scope of an original FTCA exception in 28 U.S.C. 2680 enacted alongside the FTCA's waiver of sovereign immunity." U.S. Br. 15-16. The government's proposed distinction between original exceptions and subsequent legislation that addresses original exceptions cannot be reconciled with the established principle that "[a] statute which is amended is thereafter, and as to all acts subsequently done, to be construed as if the amendment had always been there." *Blair v. City of Chicago*, 201 U.S. 400, 446 (1906) (citation omitted).

This Court has never suggested that the *Dolan* rule applies only to the FTCA as originally enacted and not to subsequent statutes that amend or alter the scope of its provisions. Nor would any such limitation make sense. When Congress enacted the Gonzalez Act, it acted against the backdrop of cases establishing the principle that the scope of exceptions would be construed in accordance with ordinary rules of statutory construction. See *Indian Towing Co. v. United States*, 350 U.S. 61, 68 (1955); *Dalehite v. United States*, 346 U.S. 15, 31 (1953); *Yellow Cab Co.*, 340 U.S. at 547-49; *United States v.*

Aetna Cas. & Sur. Co., 338 U.S. 366, 383 (1949). *Dolan* itself relied on those cases. See 546 U.S. at 492. Congress should be presumed to have had that principle in mind when it enacted the Gonzalez Act, see, *e.g.*, *Gomez-Perez v. Potter*, 553 U.S. 474, 485 (2008), especially Section 1089(e), whose terms expressly address the scope of Section 2680(h).

3. Even if the *Dolan* rule did not apply, when strictly construing a waiver of sovereign immunity, "[w]hat [the Court] . . . require[s] is that the scope of Congress' waiver be clearly discernable from the statutory text in light of traditional interpretive tools. If it is not, then [the Court] take[s] the interpretation most favorable to the Government." *FAA v. Cooper*, 132 S. Ct. 1441, 1448 (2012). That ensures that "the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires. *Ibid.* The construction of Section 1089(e) would not reach the second stage of accepting the interpretation more favorable to the government, because, for the reasons we now discuss, it is "clearly discernable" from a "fair reading" of the text and from the structure of the Gonzalez Act as a whole that Congress intended to abrogate the intentional tort exception for torts committed by the specified medical personnel.

B. The Text Of Section 1089(e) Nullifies The Intentional Tort Exception For Cases Within The Gonzalez Act

1. "When interpreting a statute, we must give words their 'ordinary or natural' meaning." *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). The natural meaning of Section 1089(e) is that it eliminates the intention-

al tort exception for claims arising from medical malpractice committed by medical personnel of the agencies specified in the Gonzalez Act. In simple declarative terms, the operative clause provides that the intentional tort exception to the FTCA "shall not apply" to torts committed by medical personnel. The introductory clause ("[f]or purposes of this section") limits the otherwise broad operative clause to the cases covered by Section 1089(a), *i.e.*, torts committed by medical personnel of the specified agencies. Section 1089(e) thus has the effect of allowing the victims of medical malpractice committed by the specified medical personnel to sue the United States under the FTCA, and, by virtue of the exclusive remedy provision in Section 1089(a), immunizing the medical personnel themselves from liability.

2. Both at the time the Gonzalez Act was enacted and at least through *United States v. Smith*, 499 U.S. 160 (1991), everyone, including the government, read Section 1089(e) to eliminate the intentional tort exception for the specified malpractice claims. When every reader comes away with the same understanding of a provision, it is powerful evidence that the shared understanding is the provision's natural meaning.

The Executive Branch told Congress at the time it was considering the Gonzalez Act that, as a result of Section 1089(e), "[t]he exception in section 2680(h) of title 28 [the intentional tort exception] . . . would not bar a claim otherwise covered by the new [Gonzalez Act]," and that it would therefore "assure an adequate remedy in all cases against the United States for injury caused" by medical personnel of the

specified agencies. S. Rep. No. 94-1264, at 13 (1976). The Senate Report explained that "Subsection (e) *would nullify* a provision of the [FTCA] which would otherwise exclude any action for assault and battery from the coverage of the [FTCA]." *Id.* at 9 (emphasis added). The House Report explained that Section 1089(e) "used the words 'assault and battery arising out of negligence' in defining a circumstance where coverage for malpractice could be allowed under the [FTCA]." H.R. Rep. No. 94-333, at 4 (1975). Representative Hogan in a committee hearing said that the statute would "allow . . . a law suit under the [FTCA] arising out of assault and battery in the limited malpractice area." *Full Committee Consideration of H.R. 3954, Hearings Before the H. Comm. on Armed Servs.*, 94th Cong. 4 (1975). Representative Gonzalez stated that the Act would "make medical malpractice claims applicable against the United States rather than the individual." 121 Cong. Rec. 4758 (1975).

The Executive Branch remained consistent for many years. In 1990, in its briefing to this Court in *Smith*, the Executive Branch three times explained that "the provision of the Gonzalez Act waiving sovereign immunity as to medical malpractice claims sounding in intentional tort, 10 U.S.C. 1089(e), will enable plaintiffs to pursue those claims against the United States." 89-1646 U.S. Reply Br. at 12; see Amicus Br. 15-16 & n.3.

3. The government offers very little in response. It asserts that the Senate Report "does not shed much light on . . . the key question here." U.S. Br. 28. But the Report is unequivocal: Section 1089(e)

"would nullify" the intentional tort exception. The government attempts to dismiss (Br. 28) the House Report, the Executive Branch statement, and the statements of Representatives Gonzalez and Hogan as "snippets" of legislative history. But that misses the critical point that those materials are not necessary to clear up an ambiguity in the language, but to show that everyone who read the words of Section 1089(e) understood them in the same way, in accordance with their natural meaning.

The government identifies (Br. 28 n.9) one colloquy in a committee hearing, reproduced at App., *infra*, 1a-3a, that it contends supports its position. In the colloquy, Representative White stated that he "presume[d] it does not affect the tort liability of the U.S. Government" and Representative Nedzi responded: "No; I don't see why it would affect the tort liability. It eliminates the individual liability of the doctors." App., *infra*, 3a. The "it" to which Representative White referred, however, was *not* the Gonzalez Act. The cited exchange immediately followed a discussion of an "indemnification arrangement" outside the FTCA for National Guard personnel that the Senate was about to add to the bill. S. Rep. No. 94-1264, at 8; see *id.* at 10-11. The exchange referred to that National Guard provision, not Section 1089.[1]

As for its representations to this Court in *Smith*, the government asserts that "[t]he meaning of Section 1089(e) was not at issue in *Smith*." U.S. Br. 24

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[1] The National Guard provision was codified at 32 U.S.C. 334 (1976) (reproduced at App., *infra*, 4a-6a), and later repealed, Pub. L. No. 97-124, § 3, 95 Stat. 1666 (1981).

n.8. But the meaning of the Gonzalez Act was sufficiently at issue in *Smith* for the Court to address it several times, see 499 U.S. at 169-75, and the government's repeated explanations of Section 1089(e) in its opening and reply briefs in *Smith* demonstrate that the government viewed that provision in particular as significant. See Amicus Br. 15-16 & n.3. Because of the importance of the Gonzalez Act in *Smith*, the government had every incentive to read it carefully. And, significantly, the government had the same incentives it has today to avoid liability. Its representation in *Smith* that Section 1089(e) would allow claims to be brought under the FTCA is therefore especially telling.

4. In contrast to petitioner's natural-meaning approach, the government offers a wholly unnatural reading. While the purely declarative "shall not apply" in the operative clause gives Section 1089(e) a real-world, non-hypothetical, meaning, the government argues that those words instead have a counterfactual meaning. According to the government, the provision operates "[b]y *deeming* Section 2680(h) inapplicable '[f]or purposes of' the immunity inquiry under Section 1089(a) . . . thus *treating* the United States *as if* it were subject to liability." U.S. Br. 18-19 (emphasis added).

As the numerous examples (including one from the Gonzalez Act itself) cited in our opening brief demonstrate, see Amicus Br. 18 n.4, when Congress intends that sort of counterfactual meaning (with or without an introductory clause like "[f]or purposes of this section") it uses precisely the kinds of counterfactual terms that are in the government's para-

phrase – "deem," "consider," "treat as if," or "assume." Congress did not use any of those terms in Section 1089(e).

To support its reading, the government offers a single example of a simple declarative that would be understood as stating a counterfactual. In "common parlance" the government explains, a listener at a moot court would understand that a participant saying "I am Justice X" is stating a counterfactual, though using simple declarative terms. U.S. Br. 21 n.4. Context is obviously critical in spoken communication, where it is likely that virtually *any* word or phrase can be omitted, given the proper context. In the government's example, for instance, it would be obvious to any listener that the speaker is not in fact Justice X, and nothing further is therefore needed to establish that the speaker is making a counterfactual statement.

That kind of context is rare in the more formal setting of statutory provisions. The government offers no example of any statute in which Congress has intended the sort of counterfactual meaning the government ascribes to Section 1089(e) without using terms like "deem," "consider," "treat," "as if," or the like, and we are aware of none.

5. The government argues that, "if it had meant to amend the FTCA to . . . expand the liability of the United States . . . with respect to intentional-tort claims against covered medical personnel," Congress would have "directly amended Section 2680(h) itself," rather than placing Section 1089(e) in a separate title of the U.S. Code. U.S. Br. 21. The placement of Section 1089(e), however, is of no signifi-

cance here. Like the other analogous agency-specific statutes, the Gonzalez Act does not generally address all government employees, or even all medical personnel, but rather concerns torts committed only by medical personnel of the specified agencies. Given Congress's decision to proceed on an agency-by-agency basis, it made sense to codify each provision addressing the intentional tort exception within the U.S. Code title and section applicable to the particular agencies involved.

Indeed, the government concedes (Br. 22) that, although it is not codified as part of the FTCA, the analogous provision that applies to VA medical personnel (originally codified at 38 U.S.C. 4116(f) and now codified at 38 U.S.C. 7316(f)) *does* limit the scope of the intentional tort exception. As the government itself previously recognized in *Smith*, Sections 1089(e) and 7316(f) reach the same result. See Amicus Br. 16 n.3. Although the government now attempts to distinguish the VA provision on the basis of its somewhat different text, the VA provision was "patterned after" Section 1089(e). S. Rep. No. 100-215, at 171 (1987). In Section 1089(e) the introductory "[f]or purposes of this section" clause operates to limit the otherwise broad provision to personnel of the agencies specified in the Gonzalez Act. In the VA provision, the same function is served by a phrase in the operative clause itself, limiting the provision to torts committed by "any person described in subsection (a)," 38 U.S.C. 7316(f) – *i.e.*, a "health care employee of the [Veterans] Administration," 38 U.S.C. 7316(a). It is not uncommon in statutes enacted at different times for somewhat different techniques to be used to convey the same essen-

tial meaning. See, *e.g.*, *Deal v. United States*, 508 U.S. 129, 134 (1993); *Brewster v. Gage*, 280 U.S. 327, 337 (1930). And significantly, the government offers no reason why Congress would have wanted to treat patients of VA medical personnel differently from patients of military and other medical personnel covered by Section 1089(e).

6. The government argues (Br. 18) that "[f]or purposes of this section" indicates that "the content of the provision affects the operation only of the statutory section in which it appears" and "should not be read to affect the operation of other statutes found elsewhere in the United States Code." The government cites no case establishing that proposition, and it ignores the principle that the meaning of words must be determined from their context in the statute as a whole. See, *e.g.*, *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004). When joined with the simple declaration that a particular exception "shall not apply," the natural meaning of "[f]or purposes of this section" is that it limits the abrogation to claims covered by "this section." That is why all participants in the legislative process and the government in *Smith* understood that Section 1089(e) eliminates the intentional tort exception for torts committed by the specified medical personnel.

C. The Structure Of The Gonzalez Act Also Establishes That Section 1089(e) Does Not Eliminate All Remedies For Medical Battery Victims

The indemnification, remand, and exclusive remedy provisions of the Gonzalez Act show that Congress structured the Act to protect medical personnel

from liability while preserving remedies for patients. Section 1089(e) fits that structure because, by making it possible for victims to bring an FTCA suit for medical battery, it excludes the possibility of suit against the employee.

1.a. The Act's indemnification provision provides that an agency head "may . . . hold harmless or provide liability insurance for" a medical employee for malpractice damages

> if [1] such person is assigned to a foreign country or [2] detailed for service with other than a Federal department, agency, or instrumentality or [3] if the circumstances are such as are likely to preclude the remedies of third persons against the United States [under the FTCA].

10 U.S.C. 1089(f)(1). The only plausible reading of that provision is that victims of malpractice committed by medical personnel in those three categories retain a cause of action against those personnel. Otherwise, there would have been no reason to authorize the government to hold harmless or provide insurance for them.

The indemnification provision comprehensively recognizes that other remedies are preserved when there is no FTCA remedy, and it authorizes indemnification in all of those circumstances. See S. Rep. No. 94-1264, at 10 ("The purpose of" the indemnification provision "is to avoid liability being assessed against an individual medical personnel in a situation where the Federal Tort Claims Act would not be applicable."). The first two clauses address two common situations specifically brought to Congress's

attention in which an FTCA remedy for medical malpractice is not available – where the responsible medical employee was (1) assigned to a foreign country and suit is brought in a foreign or state court or (2) detailed to a non-federal employer.[2] The third, catch-all clause captures the less common situations not specifically brought to Congress's attention in which there is no FTCA remedy, such as those covered by the FTCA's discretionary function exception, 28 U.S.C. 2680(a). See, *e.g.*, *Abernathy v. United States*, 773 F.2d 184, 188 (8th Cir. 1985); *Blitz v. Boog*, 328 F.2d 596, 598-600 (2d Cir. 1964).

b. The government argues (Br. 26) that the indemnification provision does not manifest a structural goal to preserve state-law remedies where no FTCA remedy is available, because it is limited to "specific situations" in which "medical personnel are deployed to foreign countries or detailed to non-federal institutions." The government's argument entirely disregards the catch-all clause, which encompasses in unqualified terms all "circumstances [that] are such as are likely to preclude the remedies of third persons against the United States." It also contravenes the settled principle that a court's obligation is "to give effect, if possible, to every clause and word of a statute." *United States v. Menasche*, 348 U.S. 528, 538-39 (1955).

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[2] See S. Rep. No. 94-1264, at 10 (noting that "[t]he Federal Tort Claims Act does not apply to actions arising in a foreign country" and that "when a medical personnel is assigned to other than a federal department – for example, as part of his military training a doctor is assigned to a private hospital – he may not be covered under the Federal Tort Claims Act").

Nor is it a fair criticism that giving effect to the catch-all clause would "render superfluous the other two prongs" of the statute. U.S. Br. 26. It is a common feature of statutory catch-all provisions that they encompass earlier items in a list, and the fact that they do so does not "render the general statutory language meaningless." See *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2171 (2012). Indeed, Section 1089(f)(1) itself includes a list ("department, agency, or instrumentality") in which the final term is broad enough to encompass the first two.

The government is similarly mistaken in contending that, if the third clause were construed in accordance with its plain meaning, it would "call[] into question the need for Section 1089(e) at all (since covered personnel could be indemnified for intentional tort claims anyway)." U.S. Br. 26. The indemnification provision provides that agency heads "may" indemnify employees for damage judgments, leaving medical personnel subject to suit and leaving them liable when agency heads choose not to reimburse. 10 U.S.C. 1089(f)(1). By making available an FTCA remedy against the United States, Section 1089(e) serves the obvious purpose of providing a greater degree of protection by immunizing medical personnel for intentional torts in *all* circumstances.

2. The Gonzalez Act's removal provision reflects the same structural goal of protecting employees while preserving a remedy for victims. It provides for remand of cases removed from state court if "a remedy by suit [under the FTCA] is not available against the United States." 10 U.S.C. 1089(c). The

plain meaning of that provision is that when there is no FTCA remedy against the United States, the case will be remanded so that the plaintiff may continue the suit against the responsible medical employee.

a. The government argues that the remand clause is limited to circumstances in which "the individual was not acting within the scope of his or her employment." U.S. Br. 25. But that is not what the provision says. It contemplates remand whenever an FTCA remedy "is not available against the United States." 10 U.S.C. 1089(c). Had Congress intended to limit remand to cases in which an employee was acting outside the scope of employment, it would have said so. Indeed, the preceding sentence specifies that a case could be removed in the first place only "[u]pon a certification by the Attorney General" that the employee "was acting in the scope of such person's duties or employment." 10 U.S.C. 1089(c). Had Congress intended a similar scope-of-employment limitation in the next sentence, it would have been natural for it to have used the very same phrase to achieve that objective. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983); see *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004). That canon applies most forcefully when the disparate language is used, as here, in two consecutive sentences in one subsection of a statute. The remand clause is not limited to cases in which the employee was acting outside the scope of employment.

b. The government argues that, if the remand clause were read literally, it would require remand even when the statute of limitations has run on an action against the United States. U.S. Br. 25. But that is not a necessary consequence of our interpretation. The Court could readily conclude that a plaintiff who fails to take advantage of an "available remedy" against the United States within the limitations period loses the right to recover against the individual employee and that remand therefore is not warranted. Cf., *e.g.*, *Gonzalez v. Crosby*, 545 U.S. 524, 532 n.4 (2005) (distinguishing between procedural (including statute of limitations) and substantive grounds for attacking a prior judgment in a habeas case).

c. The remand provision must be read in accordance with its terms to extend to any case in which an FTCA remedy is "not available." It therefore exhibits the basic structural feature of the Act; it provides for protection for medical personnel, but preserves a remedy for malpractice victims when the FTCA remedy is unavailable.

3. The exclusive remedy provision manifests the same purpose. It provides that "[t]he remedy" against the United States under the FTCA is "exclusive." 10 U.S.C. 1089(a). Particularly when read in conjunction with the indemnification and remand provisions, the meaning of the exclusive remedy provision is apparent. When the FTCA provides a remedy, it is exclusive. When the FTCA fails to provide a remedy, as when an FTCA exception applies, a remedy against the employee remains.

The government argues that *Smith* interpreted

the exclusive remedy provision of the Westfall Act, 28 U.S.C. 2679(b)(1), to preclude suits against employees even when the FTCA provides no alternative remedy, and that our "distinction . . . of *Smith* . . . is both mistaken and irrelevant." U.S. Br. 23. The government does not dispute, however, that *Smith* reached its conclusion exclusively by relying on two provisions in the Westfall Act that have no analogues in the Gonzalez Act. See Amicus Br. 45-47. Nothing in *Smith* suggests that the language of the Westfall Act that is similar to that in the Gonzalez Act supported its conclusion. Nor does the Westfall Act contain provisions like Sections 1089(c) and (f)(1) in the Gonzalez Act, which make clear the intent to preserve remedies. As this Court has stressed, context is key in statutory construction, and the same words in different contexts – especially in two different statutes enacted at different times – can and frequently do have different meanings. See, *e.g.*, *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595 & n.8 (2004). That is the case here.

4. Ultimately, the government's account of the operation of Section 1089(e) is deeply improbable. The government argues that the exclusive remedy provision alone confers blanket "immunity to covered medical personnel for tort claims arising out of the performance of their healthcare duties." U.S. Br. 17. If that were so, the exclusive remedy provision would be sufficient to dispose of petitioner's claim, and Section 1089(e) would be mere surplusage. But the government asserts that Congress was concerned that a court might interpret the exclusive remedy provision to embody our view (and the virtually uniform view of the lower courts) that the FTCA remedy is exclu-

sive only where there is such a remedy. See Amicus Br. 23 & n.5. Aware of the risk that a court might so "misinterpret" the exclusive remedy provision, Congress did not simply remove the source of the "misinterpretation" by clarifying its intent. Instead, according to the government, Congress added Section 1089(e) to the Act. Under the government's account, Section 1089(e) operates by accepting the validity of the "mistaken" interpretation. It then avoids the consequences by instructing courts to assume, counterfactually, that the FTCA *does* provide a remedy for medical battery victims, so that, as "misinterpreted," the exclusive remedy provision would still eliminate suits against employees. But since the FTCA in fact retains the intentional tort exception for such claims, no claim is actually available under the FTCA.

"It would be hard to dream up a more roundabout way" for Congress to clarify its intended meaning. *Kloeckner v. Solis*, 133 S. Ct. 596, 605 (2012). If Congress had wanted to provide that suit could not be maintained against medical personnel of the specified agencies for batteries (or intentional torts, or all conduct within FTCA exceptions) within the scope of their employment, "it could just have said so." *Ibid.* As in *Kloeckner*, "[t]he Government has offered no reason for Congress to have constructed such an obscure path to such a simple result." *Ibid.* To preclude actions against medical personnel, Congress would not have adopted a provision like Section 1089(e), whose entire operation under the government's theory is premised on the validity of a misinterpretation of another provision of the same statute. It is no wonder that no one who commented on the

meaning of Section 1089(e) at the time of enactment understood it to operate in that way.[3]

D. Construing Section 1089(e) To Permit FTCA Actions For Medical Battery Produces No "Anomaly"

The government argues that, if Section 1089(e) permits an FTCA remedy for victims of medical battery, two "significant anomalies" would be created. U.S. Br. 29. The government is mistaken; petitioner's position produces no anomaly.

1. The government argues that because "the Gonzalez Act applies only to tort suits brought against covered medical personnel individually," Section 1089(e) would operate to permit suit only where a suit is brought against an employee and "the United States is substituted for the individual defendant" under Section 1089(c), not where the suit is brought originally against the United States itself. U.S. Br. 29, 30.

The government's premise is wrong. Nothing in Section 1089(e) limits its effect to cases brought against medical personnel individually. In a case involving a medical battery committed by covered

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[3] The government's explanation is also implausible on its own terms. The feared "misinterpretation" of the exclusive remedy provision would permit suits against the specified medical personnel not merely for intentional torts, but for conduct within all of the FTCA exceptions in Section 2680, including foreign torts, discretionary functions, etc. Had Congress wanted to correct the supposed "misinterpretation," it would surely have acted to preclude all such suits against medical personnel, and the limitation of Section 1089(e) to intentional torts would be inexplicable.

medical personnel, the plaintiff would be free to sue the United States directly under the FTCA provision that makes the United States "liable" for torts committed by its employees "to the same extent as a private individual under like circumstances." 28 U.S.C. 2674. Should the United States seek to defend based on the intentional tort exception, the plaintiff would respond that the exception has been abrogated by Section 1089(e). The government's first supposed anomaly does not exist.

2. The government also argues that petitioner's position "would create a disparity between plaintiffs bringing a medical battery claim against . . . medical personnel [covered under the Gonzalez Act or analogous statutes] and those bringing an identical claim against other federal medical personnel covered only by the later enacted Westfall Act; the former would have an FTCA remedy but the latter do not." U.S. Br. 29.

What the government refers to as an "anomaly" is simply the necessary and predictable effect of Congress's decision to proceed one agency at a time when it addressed medical malpractice in the Gonzalez Act and analogous statutes. From the beginning, the agency-by-agency approach meant that intentional torts committed by medical personnel of covered agencies were treated differently from intentional torts committed by medical personnel of noncovered agencies.

The Westfall Act addressed the personal tort liability of government employees in general, not the particular issue of medical malpractice. In that context, Congress determined that it was appropriate to

eliminate such personal liability across the board, even if doing so left tort victims with no remedy. But there is nothing in the Westfall Act that suggests it was intended to have any effect on the government's own liability under the FTCA, which the Westfall Act left exactly where it found it. Thus, after the Westfall Act as before, the government's liability for medical batteries varied, depending on whether or not the tortfeasor-employee's agency was covered by the Gonzalez Act or one of its analogues.

Furthermore, taken together, the Gonzalez Act and analogous statutes likely cover most government medical personnel. The only exception the government identifies is Bureau of Prisons medical personnel. U.S. Br. Br. 30-32. But it should not be surprising if Congress left prisoners with fewer remedies than veterans, their families, or others who are likely to seek medical treatment from covered medical personnel. And a *Bivens* remedy remains available for at least some medical batteries committed against prisoners. See 28 U.S.C. 2679(b)(2)(A) (Westfall Act provision preserving *Bivens* remedies); *Carlson v. Green*, 446 U.S. 14 (1980) (recognizing *Bivens* actions for prisoners). Whatever differential treatment remains is not an "anomaly," but rather the intended result of Congress's decision to proceed in this area on an agency-by-agency basis.

E. Congress Had Good Reason To Treat Medical Battery Claims Like Other Malpractice Claims

The Gonzalez Act addresses the particular problems presented by medical malpractice claims against government medical personnel. Congress

had good reasons to treat medical battery just like other forms of medical malpractice, and to include all of them in the FTCA remedy. Medical battery malpractice is conceptually similar to negligent malpractice, and providing remedies only for the latter would lead to the drawing of artificial and unjustified lines. See Amicus Br. 33-39.

1. The government argues that the general reasons for excepting intentional torts from the FTCA – that they are "difficult to defend" and imposing liability on the government for them would be "unjust" U.S. Br. 34 – apply equally to medical batteries. That is incorrect.

a. The FTCA was enacted to address the broad issue of government liability for torts committed by government employees, not the specific issues raised by medical malpractice. The traditional rule commonly traced to *Wright v. Wilcox*, 19 Wend. 343 (N.Y. 1838), had precluded respondeat superior liability for intentional torts, and even today "it is accepted that it is less likely that a willful tort will properly be held to be in the course of employment and that the liability of the master for such torts will naturally be more limited." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 756 (1998) (internal quotation marks and citation omitted). Congress accordingly viewed most intentional torts committed by most federal employees as outside the scope of employment and an unjust basis for federal liability. See *Farragher v. City of Boca Raton*, 524 U.S. 775, 798 (1998) (citing Restatment (Second) of Agency § 229 cmt. a, for proposition that "'ultimate question' in determining the scope of employment is 'whether or

not it is just that the loss resulting from the servant's acts should be considered as one of the normal risks to be borne by the business in which the servant is employed'"). In adopting the intentional tort exception, Congress made that a hard-and-fast rule.

When specifically addressing torts committed by medical personnel in the Gonzalez Act, Congress reasonably viewed medical batteries as different from batteries committed by government employees in other contexts. Because medical personnel frequently perform procedures on the bodies of their patients, medical batteries are commonly viewed as within, not outside, the scope of a medical professional's employment. Employers are therefore often sued for such claims. See, *e.g.*, *VanBrocklen v. Erie Cnty. Med. Ctr.*, 96 A.D. 3d 1394 (N.Y. App. Div. 2012); *Wagner v. Georgetown Univ. Med. Ctr.*, 768 A.2d 546, 557 & n.16 (D.C. 2001); cf. 28 U.S.C. 2680(h) (law enforcement carve-out from FTCA intentional tort exception). Moreover, the consequences of medical batteries can be identical to the consequences of other forms of malpractice, and they can be severe. See Amicus Br. 37-38. Accordingly, excluding liability for medical battery would have excluded a large number of cases for which it would be just to hold the government liable. That differs from the non-medical setting, where the FTCA exception would generally exclude cases for which the government should not be held liable anyway.

b. Nor does the difficulty of defeating frivolous intentional tort claims provide a reason for excluding all medical battery claims. Medical personnel commonly obtain written consent before performing pro-

cedures (as occurred here, see Pet. App. 2a-3a), and medical procedures themselves are often performed with others present. Those sources of proof, which plaintiffs may have difficulty refuting, are not commonly present in garden-variety battery or other non-medical intentional tort cases.

Indeed, the government appears to concede that negligence cases based on the lack of informed consent may be brought under the FTCA. U.S. Br. 39-40. Yet just like medical battery claims, at least some informed consent claims may ultimately depend on whether the jury believes the plaintiff's testimony about what information the medical professional provided. Congress had good reason to treat both types of consent-based claims like other malpractice claims, permitting suit under the FTCA and thereby precluding suit against the employee.

2. The government also argues that excluding medical battery claims does not lead to difficult line-drawing problems because a federal standard, rather than state law, governs what constitutes "battery" under the intentional tort exception. 28 U.S.C. 2680(h). While the government is correct that a federal standard determines whether a particular claim alleges an intentional tort, that does not eliminate the necessity for difficult line-drawing in determining whether state law permits recovery on a negligence (as opposed to battery) theory in a particular case. The line between informed-consent negligence and medical battery cases can be quite complex. See Amicus Br. 34-36.

Moreover, medical battery victims can be among the most deserving malpractice claimants. See Ami-

cus Br. 37-38. Those who are treated by medical personnel covered by the Gonzalez Act, including veterans and families of those serving in the armed forces, are likely to have been viewed as especially deserving. See Amicus Br. 39. Congress had good reasons not to leave them without any remedy.

CONCLUSION

For the reasons given above and in our opening brief, the decision of the court of appeals should be reversed.

Respectfully submitted.

STEPHANOS BIBAS
NANCY BREGSTEIN GORDON
UNIV. OF PENNSYLVANIA LAW SCHOOL SUPREME COURT CLINIC
3501 SANSOM STREET
PHILADELPHIA, PA 19104

IRVING L. GORNSTEIN
GEORGETOWN UNIV. LAW CENTER
600 NEW JERSEY AVE. N.W.
WASHINGTON, D.C. 20001

JAMES A. FELDMAN
Counsel of Record
5335 WISCONSIN AVE. N.W.
SUITE 440
WASHINGTON, D.C. 20015
(202) 730-1267
WEXFELD@GMAIL.COM

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APPENDIX A

Mr. NEDZI. What had occurred was that the bill went to the Senate, and, while they haven't passed it as yet, is going to very probably pass it this afternoon in a different form.

They have added to the bill medical personnel of the Central Intelligence Agency, and the National Aeronautics and Space Administration, at the request of the chairman of the committee there.

In addition, they have added National Guard personnel, who in my judgment were covered by the original legislation even though they were not mentioned specifically.

Each of these amendments in my judgment are worthwhile additions to this important piece of legislation. We all know the problems with the medical malpractice insurance these days.

The administration supports the bill in the Senate's form, and I would request at this time that I be authorized by the committee to take from the Speaker's desk H.R. 3954 as amended by the Senate and on behalf of the committee agree to the Senate amendments in their present form.

The CHAIRMAN. Mr. Montgomery.

Mr. MONTGOMERY. Mr. Chairman, I would further add to that: I believe it does cover the Reserves, besides the National Guard. I would like to ask unanimous consent to insert my remarks.

The CHAIRMAN. Without objection, it is so ordered.

STATEMENT OF HON. G. V. (SONNY) MONTGOMERY, A REPRESENTATIVE FROM MISSISSIPPI

Mr. CHAIRMAN. I would like to comment briefly on this medical malpractice bill which has previously come before our committee for consideration. I am specifically interested in language which covers National Guard personnel and reservists performing medical or medical-oriented duties.

The bill which we have a [*sic*] already reported out and voted on was amended within our committee to include these persons and to provide coverage to them in suits based on medical malpractice. However, it appears that this language may be unconstitutional and that some changes in the original House bill were necessary.

The Senate has made the appropriate changes needed to clarify the intent of the House.

Since we have already expressed our intentions in this regard, I suggest that we support the Senate language making the United States liable for claims for personal damages brought against medical personnel of the National Guard or Reserves. This inequitable treatment has existed for too long, and it is important that we recognize the value of these medical-personnel, as well as their personal vulnerability to civil cases arising out of performance of duties during periods of training being carried out under provisions of our Federal laws. I ask that we concur in the Senate's changes and support language providing this protection to these medical personnel.

The CHAIRMAN. Mr. White.

Mr., WHITE. I am sure this goes without saying, but I presume it does not affect the tort liability of the U.S. Government.

Mr. NEDZI. No; I don't see why it would affect the tort liability. It eliminates the individual liability of the doctors.

Mr. WHITE. What about the nurses?

Mr. NEDZI. I can't remember about the nurses.

Yes; it was "medical personnel," so they are covered.

The CHAIRMAN. Without objection, Mr. Nedzi is authorized to take from the Speaker's table the bill and agree to the Senate amendment.

APPENDIX B

32 U.S.C. 334 (1976), see Pub. L. No. 94-464 § 2(b), 90 Stat. 1986, provides:

Payment of malpractice liability of National Guard Medical personnel

(a) Upon the final disposition of any claim for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any medical personnel of the National Guard in furnishing medical care or treatment while acting within the scope of his duties for the National Guard during a training exercise, the liability of such medical personnel for any costs, settlements, or judgment shall become, subject to the provisions of this section, the liability of the United States and shall be payable under the provisions of section 1302 of the Act of July 27, 1956 (31 U.S.C. 724a), or out of funds appropriated for the payment of such liability.

(b) The liability for any claim for damages under this section against any medical personnel shall become the liability of the United States only to the extent that the liability of such medical personnel is not covered by insurance. and such liability not constitute coinsurance for any purpose.

(c) Liability of the United States for damages against any medical personnel referred to in subsection (a) shall be subject to the condition that the medical personnel against whom any claim for such damages is made shall—

(1) promptly notify the Attorney General of the

claim, and in case of any civil action, or proceeding brought in any court against any such personnel, deliver all process served upon such personnel (or an attested true copy thereof) to the immediate superior of such personnel or to such other person designated by the appropriate Adjutant General to receive such papers, who shall promptly transmit such papers to the Attorney General.

(2) furnish to the Attorney General such other information and documents as the Attorney General may request, and

(3) comply with the instructions of the Attorney General relative to the final disposition of a claim for damages.

(d) The liability of the United States under this section shall also be subject to the condition that the settlement of any claim described in subsection (a) of this section be approved by the Attorney General prior to its finalization.

(e) The provisions of this section shall not apply in the case of any claim for damages against any medical personnel settled under the provisions of section 715 of title 32.

(f) As used in this section, the term—

(1) "Medical personnel" means any physician, dentist, nurse, pharmacist, paramedical, or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the Army National Guard or the Air National Guard.

(2) "Training exercise" means training or duty performed by medical personnel under section 316,

502, 503, 504, or 505 of this title or under any other provision of law for which such personnel are entitled to or has waived pay under section 206 of title 37.

(3) "Final disposition" means—

(A) a final judgment of any court from which the Attorney General decides there will be no appeal,

(B) the settlement of any claim, or

(C) a determination at any stage of a claim for damages in favor of a medical personnel and from which determination no appeal can be made.

(4) "Settlement" means any compromise of a claim for damages which is agreed to by the claimant and approved by the Attorney General prior to its finalization.

(5) "Costs" includes any costs which are taxed by any court against any medical personnel, normal litigation expenses, attorney's fees incurred by any medical personnel, and such interest as any medical personnel may be obligated to pay by any court order or by statute.

(6) "Claim for damages" means any claim or any legal or administrative action in connection with any claim described in subsection (a) of this section.

(7) "Attorney General" means the Attorney General of the United States.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
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No. 11-1351

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JAMES A. FELDMAN
Counsel of Record
5335 WISCONSIN AVE. N.W.
SUITE 440
WASHINGTON, D.C. 20015
(202) 730-1267
WEXFELD@GMAIL.COM

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QUESTION PRESENTED

Whether suit may be brought against the United States for battery committed on a civilian by military medical personnel while acting within the scope of their employment.

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INTEREST OF THE AMICUS CURIAE

This brief is submitted in response to the Court's order inviting amicus curiae to brief this case in support of petitioner.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 663 F.3d 1059. The opinion of the U.S. District Court for the District of Guam dismissing this case for lack of subject matter jurisdiction (Pet. App. 14a-41a) is unreported, but it is available at 2009 WL 8690263. The district court's opinion granting summary judgment to the United States on petitioner's negligence claim is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 2011. A petition for rehearing en banc was denied on February 15, 2012. Pet. App. 42a-43a. The petition for a writ of certiorari was filed on May 8, 2012, and granted on September 25, 2012. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Pertinent statutory provisions are set out in the appendix to this brief. App., *infra*, 1a-10a.

STATEMENT

Petitioner's complaint alleges that, although he twice withdrew consent for an ophthalmic operation, a Navy doctor performed that operation anyway, in the process causing severe injury to petitioner's eyes. The question presented is whether the Gonzalez Act, 10 U.S.C. 1089, eliminates all potential remedies for petitioner (and those in his position) for this serious violation of an interest in bodily integrity that tort law has long protected.

1.a. The Federal Tort Claims Act (FTCA) was enacted in 1946 in order to (1) "mitigate [the] unjust consequences of sovereign immunity from suit" and (2) relieve Congress of the burden of considering a "steadily increas[ing]" number of private bills. *Feres v. United States*, 340 U.S. 135, 139-40 (1950). Its key provision "waives the Government's immunity from suit in sweeping language," *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 492 (2006) (quoting *United States v. Yellow Cab Co.*, 340 U.S. 543, 547 (1951)), for injuries

> caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 1346(b)(1); see 28 U.S.C. 2674. The FTCA thus generally authorizes suit against the government for torts committed by government employees acting within the scope of their employment.

From the beginning, the FTCA's basic waiver of sovereign immunity was qualified by significant exceptions codified at 28 U.S.C. 2680, which provides that "[t]he provisions of [the FTCA] and section 1346(b) of [Title 28] shall not apply to" a variety of claims, including, for example, those "based upon the exercise or performance of . . . a discretionary function" or "arising in a foreign country." 28 U.S.C. 2680(a), (k). The exception at issue in this case is codified at 28 U.S.C. 2680(h). With an exclusion not relevant here for certain law enforcement personnel, it provides that the FTCA's waiver of sovereign immunity does not apply to

> [a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel slander, misrepresentation, deceit, or interference with contract rights.

28 U.S.C. 2680(h). Although it is known as the "intentional tort" exception, see, *e.g.*, *Sheridan v. United States*, 487 U.S. 392, 394 (1988), it does not cover

some intentional torts (such as conversion or trespass), and it includes at least some torts that may be based on negligence, such as misrepresentation. See *Block v. Neal*, 460 U.S. 289, 296-97 (1983); *United States v. Neustadt*, 366 U.S. 696, 702 (1961). Most of the included torts are likely to be outside the scope of employment for most government employees. But if a government employee does commit one of the specified torts within the scope of employment, Section 2680(h) generally bars suit against the government for the wrong.

b. The FTCA as originally enacted did not generally preclude suits against individual government employees, including government medical personnel. See, *e.g.*, *Henderson v. Bluemink*, 511 F.2d 399, 404 (D.C. Cir. 1974); *Percivill v. United States*, 252 F. Supp. 157, 159 (W.D. Tex. 1966); *Myers v. United States*, 241 F. Supp. 515, 517-18 (N.D. Tex. 1965), rev'd on other grounds, 363 F.2d 615 (5th Cir. 1966); *Henning v. Ebersole*, 166 N.Y.S.2d 167, 169 (Sup. Ct. 1957). Rather, the Act simply provided for a remedy against the United States, which if undertaken would bar an additional suit against the employee for the same conduct. See 28 U.S.C. 2676. Plaintiffs, however, generally found the FTCA suit attractive when available. See, *e.g.*, H.R. Rep. No. 94-333, at 3 (1975) (suit against the United States rather than the employee "would normally accrue to the benefit of the plaintiff should he prevail, since there is no limit on the amount of damages that could be awarded by the court . . . and apparently no limit on the assets of the United States to satisfy a judgment").

In 1976, Congress enacted the Gonzalez Act, 10 U.S.C. 1089. The Act provides that

> [t]he remedy against the United States provided by [the FTCA] for damages for personal injury . . . caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel . . . of the armed forces, the National Guard while engaged in training or duty under [specified statutes], the Department of Defense, the Armed Forces Retirement Home, or the Central Intelligence Agency in the performance of medical, dental, or related health care functions . . . while acting within the scope of his duties or employment . . . shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such [personnel] . . . whose act or omission gave rise to such action or proceeding.

10 U.S.C. 1089(a). The effect of that provision is to make "the remedy against the United States" under the FTCA preclusive of any suit against medical personnel of the armed forces or other specified agencies based on the performance of medical services within the scope of employment.

In the provision at issue in this case, the Gonzalez Act provides:

> For purposes of this section [*i.e.*, the Gonzalez Act], the provisions of section 2680(h) of title 28 shall not apply to any cause of action arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health

> care functions (including clinical studies and investigations).

10 U.S.C. 1089(e). This case involves the application of that provision to a suit for medical battery against the United States.

2. Petitioner is a veteran of the armed forces. Mot. to Substitute United States 1, ECF No. 12. At some time prior to 2003, petitioner went to the Ophthalmology Department of the U.S. Naval Hospital on Guam for evaluation and treatment of a cataract in his right eye. Lieutenant Commander Frank M. Bishop, M.D., conducted the evaluation and recommended to petitioner a surgical procedure called "phakoemulsification with intraocular lens placement." Pet. App. 2a.

Petitioner gave his consent to the surgery. But the complaint alleges that, just prior to the operation, petitioner twice withdrew consent – first when he saw what appeared to be inadequate equipment in the operating room, and again after he had been anesthetized. Nevertheless, Dr. Bishop went ahead with the surgery. Pet. App. 15a-16a.

As a result of the surgery, petitioner suffered a condition known as "corneal clouding," which resulted in symptoms including "severe pain, some ptosis, disorientation, discomfort and problems with glare and depth of field vision as well as greatly diminished visual acuity." Petitioner requires ongoing medical treatment, and his prospects for future improvement are in doubt. Pet. App. 16a.

3. In 2005, petitioner filed a complaint in the United States District Court for the District of

Guam. The complaint named both Dr. Bishop and the United States as defendants. It alleged that Dr. Bishop had been negligent in his conduct of the operation and had committed a battery by proceeding with the operation despite petitioner's withdrawal of consent. The district court granted the government's unopposed motion to substitute itself for Dr. Bishop. Pet. App. 16a-17a.

The court granted summary judgment to the government on the negligence claim after petitioner failed to come forward with necessary expert testimony. The court declined, however, to grant summary judgment to the government on the medical battery claim, holding that a genuine issue of material fact existed as to whether petitioner had consented to the surgery. See Pet. App. 3a, 17a.

On the government's motion, the district court then dismissed the medical battery claim for lack of subject matter jurisdiction. The court held that Section 2680(h) excludes that claim from the FTCA's waiver of sovereign immunity. Pet. App. 24a-25a.[1]

4. The court of appeals affirmed. In the court's view, "the primary purpose of the Gonzalez Act is 'to protect military medical personnel from malpractice liability.'" Pet. App. 7a (quoting *Smith v. United States*, 499 U.S. 160, 172 (1991)). The court held

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[1] The district court also rejected petitioner's contention that his claim was authorized under 38 U.S.C. 7316(f), a statute worded similarly to Section 1089(e). Pet. App. 38a. The court of appeals affirmed the district court's holding, on the ground that Section 7316 is inapplicable to Navy doctors. Pet. App. 13a. The petition for certiorari does not challenge that holding.

that "to be consistent with this purpose," it must "read subsection (e) not as a *waiver of sovereign immunity* for battery claims brought against the United States, but as an *expression of personal immunity* from battery claims brought against military medical personnel." *Ibid.* The court held that the Section 2680(h) exception to the FTCA's broad waiver of sovereign immunity remains fully applicable and bars battery claims brought under the FTCA.

The court of appeals also believed that petitioner's construction of Section 1089(e) "runs counter to well-established guidelines for interpreting waivers of sovereign immunity," in accordance with which "limitations and conditions upon the waiver are to be strictly observed and exceptions thereto are not to be implied." Pet. App. 8a (internal quotation marks omitted). The court noted that petitioner's view of the Gonzalez Act was "plausible," but that it "cannot result in a waiver when nothing short of an unequivocal expression will do." Pet. App. 9a.

Finally, the court relied on this Court's holding in *Smith* that the statute at issue there – 28 U.S.C. 2679(b)(1) – "immunizes Government employees from suit *even when an FTCA exception precludes recovery against the Government.*" Pet. App. 12a (quoting *Smith*, 499 U.S. at 166, and adding emphasis). In the court's view, *Smith* establishes that the same is true of the Gonzalez Act. Pet. App. 13a.

SUMMARY OF ARGUMENT

A traditional and long-accepted function of tort law is to provide protection against and redress for unauthorized intrusions into a person's bodily integrity. In this case, the court of appeals held that

Congress eliminated that protection for patients treated by medical personnel employed by the armed forces and certain other federal agencies when it included 10 U.S.C. 1089(e) in the Gonzalez Act. Because the text, structure, and history of the Act shows that Congress preserved a tort remedy, the court of appeals' decision should be reversed.

1. The text of Section 1089(e) includes an operative clause providing that the intentional tort exception to the FTCA "shall not apply" to tort actions arising from the conduct of medical personnel. The operative clause, by itself, would have eliminated the intentional tort exception for all medical malpractice claims. The introductory clause ("[f]or purposes of this section") limits the effect of the operative clause to just the claims covered by the Gonzalez Act against personnel of the specified agencies, since Congress decided to proceed in this area on an agency-by-agency basis. By eliminating the intentional tort exception for that set of claims, Congress made the government itself liable for them under the FTCA. As the government repeatedly explained in its briefs in *Smith*, the Gonzalez Act "will serve an important function: authorizing the pursuit of 'intentional' malpractice claims against the United States." 89-1646 U.S. Br. 34.

The court of appeals' conclusion that the introductory clause eliminates all tort remedies for medical battery is mistaken. It would read the text of Section 1089(e) as a counterfactual directive, requiring courts to pretend that the intentional tort exception does not apply when in fact it continues to bar suits for victims of medical battery by medical

personnel of the specified agencies. When Congress wants to direct such a counterfactual, however, it instead uses different terms, such as "shall be considered" or "deemed." Indeed, Congress used the term "deemed" to direct a counterfactual in another provision of the Gonzalez Act itself. By using the simple declarative ("shall not apply") in Section 1089(e) instead, Congress created a provision that has the real-world effect of abrogating the intentional tort exception and rendering the government liable for those torts. Moreover, the court of appeals' reason for adopting its construction – that its reading was required by the purposes of Section 1089(e) – is mistaken. There is no basis to conclude that Section 1089(e) must be read with the single-minded aim of achieving one and only one purpose. In any event, the court of appeals failed to grasp the dual purposes of the Gonzalez Act to protect federal medical personnel while still permitting redress for tort victims.

2. The structure of Section 1089(e) confirms that the Gonzalez Act does not eliminate all remedies for victims of medical battery. Three provisions of the Gonzalez Act establish that the Act's scheme is to channel tort remedies into two paths – (1) suit against the government under the FTCA or, (2) where such suit is unavailable, suit against the individual employee combined with federal indemnification or insurance. In Section 1089(f), the Act provides for such indemnification for suits against individual employees involving conduct in a foreign country or within other FTCA exceptions. Similarly, Section 1089(c) provides a removal mechanism to ensure that tort suits do not proceed against the em-

ployee where an FTCA suit is available; where an FTCA suit is unavailable, remand is required. The exclusive remedy provision in Section 1089(a) also operates to preclude remedies against individual employees only if an alternative remedy against the government is available. Within that structure, Section 1089(e) similarly protects employees while leaving a remedy open. By permitting suit against the government for medical battery, it treats victims of medical battery like all other malpractice victims. It requires them to obtain relief exclusively through suit against the government, thereby protecting individual employees from suit.

3. The history of the Gonzalez Act demonstrates that Congress and the Executive Branch understood and intended that the Act would "nullify a provision of the Federal Tort Claims Act which would otherwise exclude any action for assault and battery" from the FTCA's coverage. S. Rep. No. 94-1264, at 9 (1976). Not a word in that history suggests that Congress wanted to deprive tort victims of all redress.

4. The court of appeals' holding that, among all victims of medical malpractice, victims of medical battery alone should be barred from any recovery would entangle courts in confusion and lead to arbitrary results Congress did not intend. The States have adopted widely varying rules on how medical battery claims must be pleaded. Under the court of appeals' holding, however, malpractice victims will have their remedy allowed or eliminated based on the niceties and fine distinctions of state pleading requirements – even though all States would in the

end recognize a right to relief for victims of medical battery. Moreover, while most malpractice victims would have a remedy, those whose claims were determined to sound in battery, which may involve particularly serious injuries, would be left in the cold. The excluded victims likely consist of veterans and family members of those who serve in the armed forces and whom Congress would not have wanted to disadvantage.

5. Petitioner's reading of Section 1089(e) comports with this Court's teachings on sovereign immunity. This Court's cases on FTCA exceptions establish that no strict rule requiring "unequivocal waiver" applies. Instead, Section 1089(e), like other provisions affecting FTCA exceptions, should be construed in accordance with all the usual tools of statutory interpretation. In any event, petitioner's reading of Section 1089(e) would satisfy any applicable strict construction rule, because the traditional tools of statutory construction make its meaning clearly discernable.

6. Petitioner's reading is also consistent with this Court's decision in *Smith*, which involved a different statute, with different provisions, structure, history, and purposes. The statute at issue in Smith contains no analogue to Section 1089(e), and the Court expressly rested its decision in *Smith* on two provisions that have no analogue in the Gonzalez Act.

ARGUMENT

Tort law has long protected the basic interest in bodily integrity. In particular, victims of medical malpractice, including both negligence-based and battery-based malpractice, may recover for their in-

juries. After enactment of the FTCA, a civilian victim of malpractice committed by an armed forces doctor (or other medical employee) could take advantage of these traditional remedies. If the claim sounded in negligence, the victim had the choice either to sue the government under the FTCA or to sue the doctor directly. If the claim sounded in battery, the victim could sue only the doctor, because the intentional-tort exception excluded battery suits against the government. In either case, however, the victim had a remedy.

The Gonzalez Act altered this scheme by requiring victims to invoke an available FTCA remedy against the government instead of suit against the employee. But it carefully preserved a remedy against the employee in cases in which the FTCA remedy is not available. The question presented in this case is whether the Gonzalez Act, while preserving the right of a tort victim to obtain some remedy in all other cases, entirely eliminated all remedies for the traditional tort of medical battery. The text, structure, history, and purpose of the Gonzalez Act establish that it did not.

I. THE TEXT OF SECTION 1089(e) ELIMINATES THE INTENTIONAL TORT EXCEPTION FOR CASES WITHIN THE SCOPE OF THE GONZALEZ ACT

The text of Section 1089(e) abrogates the intentional-tort exception for cases within the scope of the Gonzalez Act. The court of appeals misread that text by applying a counterfactual reading that does not accord with the simple declarative terms Congress chose and by requiring that Section 1089(e) be con-

strued in accordance with a mistaken idea of its purpose.

A. The Text of Section 1089(e) Limits the Abrogation of the FTCA's Intentional Tort Exception to Torts of Medical Personnel in the Armed Forces and Other Specified Agencies

1. Section 1089(e) has two parts. The introductory clause is "[f]or purposes of this section." The operative clause provides that "the provisions of section 2680(h) of title 28 shall not apply to any cause of action arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions." If taken alone, the operative clause would have only one reasonable reading: It would abrogate the intentional tort exception to the FTCA (Section 2680(h)) for torts committed by *all* government medical personnel.

Congress, however, decided to proceed in this area on an agency-by-agency basis. The Gonzalez Act therefore does not seek to address medical malpractice by all government medical personnel. Instead, it addresses only claims against medical personnel in the armed forces, the National Guard during training, the Department of Defense, the Armed Forces Retirement Home, and the CIA. 10 U.S.C. 1089(a).[2]

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[2] As originally enacted, the Gonzalez Act did not include National Guard medical personnel in Section 1089, but instead included a separate section codified at 32 U.S.C. 334 (1976), which provided for indemnification for National Guard medical personnel but did not include them in the FTCA system. In 1981, Congress repealed that provision and amended Section 1089(a) to include National Guard medical personnel. See Pub. L. No. 97-124, §§ 2, 3, 95 Stat. 1666 (1981). The predecessor of

Congress addressed medical malpractice claims against personnel of other agencies in other statutes enacted both before and after the Gonzales Act. See pp. 28-29, 32-33, *infra*.

The function of the introductory "[f]or purposes of this section" clause is therefore straightforward. It limits the abrogation of the intentional tort exception to just the claims covered by "this section," *i.e.*, claims based on malpractice – including, in particular, medical battery – committed by medical personnel employed by the armed forces and the other specified agencies. By abrogating the intentional tort exception for that set of claims, Section 1089(e) has the effect of making the United States liable for them under the FTCA. At the same time, because the Gonzalez Act makes the FTCA the exclusive remedy for those claims, 10 U.S.C. 1089(a), it immunizes medical personnel from liability for such claims.

2. The government has previously expressed precisely that understanding of the meaning of the Gonzalez Act. In its brief in *Smith*, the government explained that

> in providing that the FTCA exception for intentional torts does not apply to medical malpractice claims, the [Gonzalez] Act has the effect of permitting FTCA actions against the United States based upon allegations that a doctor has performed medical procedures to which the plaintiff did not consent. 10 U.S.C. 1089(e).

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the Armed Forces Retirement Home was also added to the Gonzalez Act later. See Pub. L. No. 98-94, § 934(a), 97 Stat. 614, 651 (1983).

Smith, U.S. Br. at 32-33. In its briefing in *Smith*, the government repeated that explanation twice more with respect to Section 1089(e) and an additional time in discussing a similar statute addressing VA medical personnel.[3] That is petitioner's position in this case.

B. The Court of Appeals Erred in Construing "[f]or purposes of this section" To Require a Counterfactual Inquiry

1. The court of appeals found the above interpretation of Section 1089(e) "plausible," Pet. App. 6a, 9a, and "a viable reading at first blush," Pet. App. 6a. It concluded, however, that the introductory "[f]or purposes of this section" clause mandated a far

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[3] See *Smith*, U.S. Br. 34 ("[T]he Reform Act also has no effect on the Gonzalez Act's waiver of sovereign immunity as to malpractice claims sounding in intentional tort. Thus even after the Reform Act, the Gonzalez Act (and other statutes containing similar provisions . . .) will serve an important function: *authorizing the pursuit of 'intentional' malpractice claims against the United States under the FTCA*.") (emphasis added) (citation omitted); U.S. Reply Br. 12 ("[T]he provision of the Gonzalez Act waiving sovereign immunity as to medical malpractice claims sounding in intentional tort, 10 U.S.C. 1089(e), *will enable plaintiffs to pursue those claims against the United States*.") (emphasis added); see also U.S. Reply Br. 12-13 ("[T]here is no inconsistency between our position and the enactment, in the same year as the Reform Act [the statute at issue in *Smith*], of a waiver of sovereign immunity for malpractice claims sounding in intentional tort against medical personnel of the Veterans Administration, 38 U.S.C. 4116(f). . . . Had that amendment not been passed, the effect of applying the Reform Act to VA physicians would have been to bar such 'intentional' malpractice claims altogether. *By virtue of its enactment, plaintiffs may now pursue those claims against the United States*.") (emphasis added) (citation omitted).

less natural reading. According to the court, the introductory clause of Section 1089(e) requires a court to *pretend* that the intentional tort exception does not apply and suit may be brought against the government; the purpose is said to be to invoke the exclusive remedy provision in Section 1089(a) and thereby insulate medical personnel from liability. Pet. App. 7a-8a. But under the court of appeals' interpretation, that pretense would be counterfactual. The intentional tort exception would actually continue to bar medical battery and other intentional tort suits against the government.

The court of appeals was driven to its counterfactual reading by its view that the "[f]or purposes of this section" language requires an interpretation that carries out the purpose of the Gonzalez Act. The court viewed that purpose as "to protect military medical personnel from malpractice liability" and nothing else. Pet. App. 7a (quoting *Smith*, 499 U.S. at 172).

2. The court of appeals' analysis is flawed for two reasons. First, if Congress had intended the court of appeals' interpretation, it would have achieved it through statutory text, not by sending courts on an elusive search for the Gonzalez Act's purpose. Second, the court's interpretation rests on an incomplete understanding of the statute's dual purposes; a full understanding of those purposes supports petitioner's interpretation, not that of the court of appeals.

a. Had Congress intended to achieve the goal the court of appeals posited, it could have easily done so. The most direct way would have been simply to pro-

vide that suits for assault, battery, etc. – the torts covered in Section 2680(h) – may not be brought against government medical personnel of the specified agencies for conduct within the scope of their employment. Alternatively, if Congress had wanted to proceed by way of a counterfactual assumption, it would have used terms such as "deemed" or "considered" to accomplish that end, as it does in other statutes where it wants courts to adopt such assumptions.[4] For example, it could have provided

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[4] The examples are numerous. See, *e.g.*, 7 U.S.C. 7283(b) ("For purposes of this section, raw cane sugar, refined beet sugar, and in-process sugar eligible for a loan under section 7272 of this title *shall not be considered* an agricultural commodity." (emphasis added)); 15 U.S.C. 78o-11(e)(3)(B) ("For purposes of this subsection, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, and the Federal home loan banks *shall not be considered* an agency of the United States." (emphasis added)); 26 U.S.C. 857(c)(1) ("For purposes of section 243 (relating to deductions for dividends received by corporations), a dividend received from a real estate investment trust which meets the requirements of this part *shall not be considered* a dividend." (emphasis added)); 42 U.S.C. 422(c)(2) ("For purposes of sections 416(i) and 423 of this title, any services rendered by an individual during a period of trial work *shall be deemed* not to have been rendered by such individual in determining whether his disability has ceased in a month during such period." (emphasis added)); 42 U.S.C. 416(b) ("For purposes of subparagraph (C) of section 402(b)(1) of this title, a divorced wife *shall be deemed* not to be married throughout the month in which she becomes divorced." (emphasis added)); 42 U.S.C. 6305(f) ("For purposes of this section, if a manufacturer or private labeler complied in good faith with a rule under this part, then he *shall not be deemed* to have violated any provision of this part by reason of the alleged invalidity of such rule." (emphasis added)); see also 29 U.S.C. 1144(b)(2)(B) (ERISA "deemer" clause); *FMC Corp. v. Holliday*,

that "[f]or purposes of this section, 28 U.S.C. 2680(h) shall be deemed not to apply." That is precisely how the government paraphrases what it claims is the meaning here. See BIO 8 (Gonzalez Act operates "[b]y *deeming* Section 2680(h) inapplicable '[f]or purposes of this section'" (emphasis added)). Indeed, in the Gonzalez Act's removal provision, where Congress *did* intend a counterfactual meaning, Congress used just this kind of "deemed" construction to direct that in certain circumstances an action shall be "deemed a tort action brought against the United States" notwithstanding that it was in fact brought against an employee. 10 U.S.C. 1089(c); see pp. 23-24, *infra*.

In Section 1089(e), Congress did not directly provide that suits against medical personnel for intentional torts are barred, and it used the simple declarative "shall not apply" in Section 1089(e) *without* using the "deemed" construction or any other indication that it intended courts to assume a state of affairs that is directly contrary to fact. Congress thereby provided that its command in Section 1089(e) should have real-world, not counterfactual, effect. Section 1089(e) does not ask a court to imagine that the intentional tort exception does not exist, when in fact it actually does. Instead, it abrogates the intentional tort exception for medical torts committed by medical personnel of the specified agencies.

b. The court's view that the introductory "[f]or

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498 U.S. 52, 61-63 (1990) (interpreting ERISA "deemer" clause).

purposes of this section" clause sends a court on a quest for the statute's principal purposes is especially unlikely. As this Court has explained, statutes are frequently enacted for multifarious reasons, and determining the purpose of a statute can be an indeterminate and disputed process. See, *e.g.*, *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). In contrast to the court of appeals' approach, petitioner's interpretation of the introductory clause – that it limits the abrogation of the intentional tort exception to claims covered by the Gonzalez Act – is straightforward and grounded in the text of the statute.

c. The court of appeals' interpretation also rests on a misunderstanding concerning the principal purposes of the Gonzales Act. "[N]o legislation pursues its purposes at all costs," *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1710 (2012), and "[e]very statute proposes, not only to achieve certain ends, but also to achieve them by particular means," *Dir., Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 136 (1995). As explained below, the Gonzales Act had two goals. It was intended not only to immunize medical personnel from liability, but also to shift responsibility for medical malpractice to the United States. See pp. 21-27, *infra*. Petitioner's reading accomplishes both purposes. In contrast, the court of appeals' interpretation accomplishes only one, leaving victims of medical battery without any remedy.

II. THE STRUCTURE OF SECTION 1089 CONFIRMS THAT CONGRESS INTENDED TO MAKE THE GOVERNMENT RESPONSIBLE FOR TORT DAMAGES, NOT TO ELIMINATE THE ABILITY OF TORT VICTIMS TO OBTAIN REDRESS

The structure of the Gonzalez Act confirms that the Gonzalez Act did not entirely eliminate traditional tort remedies for victims of wrongs committed by government medical personnel. Instead, the Gonzalez Act channels such remedies into two categories: (a) remedies against the government and (b) remedies against the employee with authorization for government indemnification and insurance. Three provisions of the Gonzalez Act confirm the intent to channel remedies into those two paths: the indemnification provision in Section 1089(f), the removal provision in Section 1089(c), and the exclusive remedy provision in Section 1089(a).

A. The Gonzalez Act Permits Actions Against Individual Employees if an Alternative FTCA Suit Against the Government Is Unavailable

1. Before the Gonzalez Act, a victim of malpractice by a government doctor acting within the scope of employment generally could sue the government under the FTCA. But because the FTCA includes a number of exceptions, such as the exception for "[a]ny claim arising in a foreign country," 28 U.S.C. 2680(k), some tort victims could not sue the government. Their only remedy was a state-law suit against the individual employee. The Gonzalez Act addressed such suits in several ways.

2. The Gonzalez Act includes a provision author-

izing indemnification and insurance for medical personnel who are subject to state-court suits for torts committed within the scope of their employment. It provides:

> [T]he head of the agency concerned may . . . hold harmless or provide liability insurance for any person described in subsection [1089](a) for damages for personal injury . . . caused by such person's negligent or wrongful act or omission in the performance of medical, dental, or related health care functions . . . while acting within the scope of such person's duties if [1] such person is assigned to a foreign country or [2] detailed for service with other than a Federal department, agency, or instrumentality or [3] if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 1346(b) of title 28, for such damage or injury.

10 U.S.C. 1089(f)(1).

Under this provision, there are three categories of cases in which an agency head may authorize indemnification, the first and third of which are relevant for present purposes because they specifically include cases arising within the FTCA exceptions. The first category consists of cases in which the employee "is assigned to a foreign country." Because the FTCA expressly excludes "[a]ny claim arising in a foreign country," 28 U.S.C. 2680(k), this category consists of cases in which no FTCA remedy is available. The other, catch-all category – where "the circumstances . . . preclude the remedies of third persons against the United States" under the FTCA –

by its terms also consists of cases in which no FTCA remedy is available. Because the entire indemnification provision applies only to torts arising "within the scope of [the employee's] duties," most or all cases in this third category are those falling within the other FTCA exclusions in Section 2680.

The indemnification provision is thus Congress's solution to the problem of state-law suits against covered medical personnel based on claims that fall within an FTCA exclusion. And the solution Congress chose in such situations was not simply to leave victims without a remedy. Instead, Congress chose to indemnify or insure federal employees to protect them from the financial costs of suits, while preserving a remedy for victims of malpractice.[5] There is no other possible meaning of Section 1089(f)(1). Cf. *Hui v. Castaneda*, 130 S. Ct. 1845, 1854 (2010) (considering but not passing on similar construction of analogous statute, 42 U.S.C. 233(f)).

3. The removal provision of the Gonzalez Act, 10 U.S.C. 1089(c), similarly shows that the Act was intended to preserve remedies for medical malpractice committed by covered medical personnel. Section 1089(c) provides that upon certification by the Attorney General

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[5] This is the virtually uniform view of the courts that have examined the issue. See, *e.g.*, *Newman v. Soballe*, 871 F.2d 969, 972-973 (11th Cir. 1989); *Pelphrey v. United States*, 674 F.2d 243, 246 (4th Cir. 1982); *Jackson v. Kelley*, 557 F.2d 735, 740-741 (10th Cir. 1977); *Burchfield v. Regents of Univ. of Colo.*, 516 F. Supp. 1301 1304 (D. Colo. 1981); *Anderson v. O'Donoghue*, 677 P.2d 648, 651-652 (Okl. 1983); but see *Powers v. Schultz*, 821 F.2d 295, 298 (5th Cir. 1987).

> that any person described in subsection (a) was acting in the scope of such person's duties or employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed . . . to the district court of the United States . . . and the proceeding deemed a tort action brought against the United States under the provisions of title 28 and all references thereto.

10 U.S.C. 1089(c). By this means, Congress converted state-court suits against individual employees into FTCA suits in federal court against the government.

That is not the end of the story, however. A motion to remand may be filed, and, if the district court "determine[s] . . . that the case so removed *is one in which a remedy by suit within the meaning of [Section 1089(a)] is not available* against the United States, the case shall be remanded to the state court." 10 U.S.C. 1089(c) (emphasis added). If the FTCA remedy "is not available," therefore, Congress's direction is to remand the case to state court, where it can continue to be litigated against the employee. Section 1089(c), like the indemnification provision in Section 1089(f)(1), is thus premised on the proposition that the suit can go forward against the employee if no FTCA remedy is available against the government. Channeling suits into FTCA actions against the government where such actions are available, while preserving a continued right to bring suit against the employee where not, was the

basic structural mechanism of the Gonzalez Act.[6]

4. Finally, the Gonzalez Act's exclusive remedy provision, 10 U.S.C. 1089(a), also manifests Congress's intent to afford some remedy for medical malpractice by the medical personnel it covers. That provision specifies that "[t]he remedy against the United States provided by [the FTCA] for damages for personal injury . . . caused by the negligent or wrongful act or omission" of medical personnel of the armed forces or other specified agencies "while acting within the scope of [their] duties or employment . . . shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such" government medical personnel. 10 U.S.C. 1089(a). Particularly when read in light of the Act's indemnification and removal provisions, the meaning of the exclusive remedy provision is clear. Under Section 1089(a), "[t]he remedy against the United States" under the FTCA precludes any action against the individual employee. Conversely, when there is no "remedy against the United States," there is no preclusion, and the suit against

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[6] An additional provision of the Gonzalez Act, 10 U.S.C. 1089(d), specifically empowers the Attorney General to settle claims in suits against individual employees, and it thus also demonstrates Congress's intent that such suits can proceed when suit against the government is unavailable. See *Burchfield*, 516 F. Supp. at 1304 (observing that suit against a military medical professional for conduct within the scope of employment "may be a proper case for compromise or settlement pursuant to § 1089(d) or for indemnification under 10 U.S.C. § 1089(f)").

the employee may go forward.[7]

5. The structure of the Gonzalez Act thus shows solicitude for government employees. It provides for the government either to bear the brunt of tort lawsuits or to provide indemnity and insurance to the employee where no suit against the government is available, and it provides for a procedural mechanism – removal– to protect employees from state-law suits in appropriate cases. But, contrary to the court of appeals' position, see Pet. App. 5a, 7a, solicitude for government employees is not the only factor at work. The Act's structure also shows solicitude for tort victims, who retain a remedy for tortious conduct. Nowhere in the structure of the Act is there any indication that Congress intended to protect government medical personnel by simply eliminating the ability of victims of long-recognized torts to obtain any redress.

B. Section 1089(e) Comports with the Gonzalez Act's Structure

Section 1089(e) comports with the Gonzales Act's structure by protecting medical personnel from suit

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[7] The government reads Section 1089(a) instead as precluding a remedy against the individual employee even for cases in which, due to an FTCA exclusion, no remedy is available against the United States. See BIO 7, 11 n.7. As the government concedes, if Section 1089(a) were read in that way, Section 1089(e) would serve no function at all, because Section 1089(a) alone would have achieved the same result without it. See *ibid.* (Section 1089(e) ("Section 1089(e) is arguably superfluous."). In any event, the government's reading makes no sense in light of the Gonzalez Act's indemnification and removal provisions, which clearly provide for suits against employees and their consequences.

while preserving the ability of tort victims to obtain redress. Claims in which the issue is whether medical personnel had adequate consent to perform a procedure, are historically, practically, and conceptually closely tied to, and very difficult to distinguish from, other medical malpractice actions. Indeed, such medical battery cases can be among the most compelling medical malpractice cases, and the least likely ones in which Congress would have intended to foreclose remedies altogether. See pp. 37-38, *infra*. Accordingly, rather than continuing to permit medical battery cases to be brought against individual employees, Congress chose to channel medical battery cases into FTCA suits against the government, with the consequence that suits against the employee would be barred. The important point, however, is that the structural mechanism of the Gonzalez Act remained entirely intact. Medical personnel of the specified agencies are protected from suit, while victims of tortious conduct retain a remedy against the government.

By contrast, the court of appeals' result would create an inexplicable anomaly. The Gonzalez Act generally preserves a remedy for victims of malpractice committed by employees of the specified agencies, and the government and its medical personnel thus have an undoubtedly beneficial incentive to exercise proper care. But, under the court of appeals' interpretation, the Act would leave victims of medical battery, unlike other malpractice victims, with no opportunity to obtain redress for often serious injuries, and an important incentive for the government and its medical personnel to conduct themselves properly would be eliminated. That result is incon-

sistent with how the rest of the Gonzalez Act works, and it should be rejected.

III. CONGRESS UNDERSTOOD THAT SECTION 1089 PERMITS FTCA SUITS FOR MEDICAL BATTERY AND OTHER INTENTIONAL TORTS

The Gonzalez Act went through a number of iterations before it was enacted in 1976. At each stage, Congress indicated its intent to treat medical battery like other forms of medical malpractice, substituting FTCA liability for individual employee liability. At no point is there any suggestion that Congress intended to protect government employees by entirely eliminating remedies for some tort victims.

A. Pre-Gonzalez Act Statutes

The Drivers' Liability Act (DLA) was passed in 1961 to address suits against federal employees for damages arising from the operation of motor vehicles within the scope of their employment. Pub. L. No. 87-258, 75 Stat. 539 (1961). Under the DLA, a "remedy by suit against the United States" under the FTCA was an exclusive remedy, barring any other action. 28 U.S.C. 2679(b) (1964).[8] In 1965, Congress adapted the same scheme to address suits against Veterans Administration medical personnel in a statute now codified at 38 U.S.C. 7316. See Pub. L. No. 89-311, 79 Stat. 1156 (1965).

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[8] See S. Rep. No. 87-736 at 13 (1961) (letter from William P. Rogers, Deputy Attorney General) (noting that the exclusive remedy provision of the DLA was "confin[ed] to . . . circumstances where suit could be brought against the United States under the [FTCA]").

Neither the DLA nor Section 7316 as first enacted included a provision analogous to Section 1089(e). The first of the DLA-inspired immunity statutes to include a provision analogous to Section 1089(e) is now codified at 42 U.S.C. 233. Pub. L. No. 91-623, 84 Stat 1868 (1970). In terms similar to Section 1089(e), that statute made the intentional tort exception inapplicable "to assault or battery arising out of negligence" in the provision of medical services by Public Health Service employees. 42 U.S.C. 233(e).

B. The Gonzalez Act

1. In 1971, a bill was introduced that would have included provisions analogous to those in the Gonzalez Act (though applying only to the armed forces and not the other specified agencies), but without Section 1089(e). Instead, the bill would have directly amended Section 2680(h) itself by adding language eliminating from that exception medical torts by employees of the armed forces "arising out of assault or battery." S. 1078, 92nd Cong. (1971). The bill was introduced by Senator Griffin, who explained that "the Federal Tort Claims Act does not subject the United States to liability for an assault and battery committed by a Government employee. Malpractice suits, arising out of medical treatment, sometimes are based on 'lack of consent' and brought on a theory of assault and battery." 117 Cong. Rec. 4518 (1971). The proposed bill would "*permit malpractice actions based on assault and battery to be brought against the United States* . . . [and] assure that a plaintiff's existing right of action for alleged acts of malpractice is not limited." *Ibid.* (emphasis added).

2. In 1975, Representative Gonzalez proposed H.R. 3954, the bill that ultimately became the Gonzalez Act.[9] In introducing it, he stated that the Act would "make medical malpractice claims applicable against the United States rather than the individual." 121 Cong. Rec. 4578 (1975). The House Committee on Armed Services considered the effects of Section 2680(h) in medical malpractice suits when it held hearings on the bill. During those hearings, Representative Hogan noted that Section 2680(h) "does not allow a claim or a law suit arising out of assault and battery." *Full Committee Consideration of H.R. 3954, Hearings Before the H. Comm. on Armed Servs.*, 94th Cong. 4 (1975). He then stated that "[w]hat [proposed Section 1089(e)] does in a malpractice suit *is allow a claim arising out of assault and battery, or a law suit under the Federal Tort Claims Act arising out of assault and battery* in the limited malpractice area." *Ibid.* (emphasis added).

The subsequent House Report indicated that Section 1089(e) "use[d] [] the words 'assault and battery arising out of negligence' *in defining a circumstance where coverage for malpractice could be allowed un-*

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[9] Section 1089(e) in H.R. 3954 provided: "For purposes of this section, the provisions of section 2680(h) of title 28 shall not apply to assault and battery arising out of negligence in the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations." H.R. 3954, 94th Cong. (1975). The provision was virtually identical to Section 1089(e) as enacted, except that it applied only to assault and battery and not to other intentional torts, and it applied only to conduct arising out of negligence, rather than "negligence or a wrongful act or omission," as in the final bill.

der the provisions of the Federal Tort Claims Act." H.R. Rep. No. 94-333, at 4 (1975) (emphasis added).

3. The Senate Committee amended the bill to bring it into its final form. The changes broadened, but did not otherwise affect, Section 1089(e). See note 9, *supra*. As the Senate Report explained, "[s]ubsection (e) would *nullify a provision of the Federal Tort Claims Act which would otherwise exclude any action for assault and battery from the coverage of the Federal Tort Claims Act.*" S. Rep. No. 94-1264, at 9 (emphasis added). The report went on:

> In some jurisdictions it might be possible for a claimant to characterize negligence or a wrongful act as a tort of assault and battery. In this way, the claimant could sue the medical personnel in his individual capacity . . . simply as a result of how he pleaded his case. In short, subsection (e) makes the [FTCA] the exclusive remedy for *any action, including assault and battery, that could be characterized as malpractice.*

Id. at 9-10 (emphasis added).[10]

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[10] The court of appeals (Pet. App. 7a-8a) and the government (BIO 7 n.6) correctly rely on this passage to contend that Congress was concerned that, without Section 1089(e), fine points of pleading, rather than substantive differences in conduct, could make the difference between a permitted medical negligence claim and a prohibited medical battery claim under the FTCA. The solution embodied in Section 1089(e), however, was not to give dispositive weight to those fine points of pleading, leaving some victims of malpractice with no remedy against anyone. Instead, the solution adopted in Section 1089(e) was to permit malpractice claims, however pleaded, to be brought against the government under the FTCA, thereby excluding such actions against individual medical employees.

The Executive Branch read the bill the same way. In a letter to the Senate Committee, a Department of Defense representative explained that, under Section 1089(e), "[t]he exception in section 2680(h) of title 28 for claims arising out of assault or battery would not bar a claim otherwise covered by the new [Gonzalez Act]." S. Rep. No. 94-1264, at 13. Permitting such claims would advance the dual purposes of the Gonzalez Act that he articulated:

> [T]here is now an urgent need *both* to assure an adequate remedy in all cases against the United States for injury caused by malpractice or negligence by persons in the medical and related specialties in the armed forces, within the scope of their duties, *and* to make that remedy the exclusive remedy for that malpractice.

Ibid. (emphasis added). The Gonzalez Act would "insure[] the availability of adequate compensation for legitimate malpractice claims *and* insulate[] medical practitioners from frivolous lawsuits." *Ibid.* (emphasis added).

C. Post-Gonzalez Act Statutes

Congress passed a series of contemporaneous and later statutes replicating the same scheme for the benefit of other government medical personnel. See 51 U.S.C. 20137 (NASA; originally enacted as 42 U.S.C. 307 in 1976); 22 U.S.C. 2702 (State Department; originally enacted as 10 U.S.C. 1091 in 1976); see also 38 U.S.C. 7316 (VA statute amended in 1987 to include provision analogous to Section 1089(e)). In addition, Congress enacted two other statutes addressing the same problem in the same way for non-medical professionals. See 10 U.S.C. 1054 (Depart-

ment of Defense legal personnel; originally enacted in 1986); 5 U.S.C. 8477 (Thrift Investment Board fiduciaries; originally enacted in 1986).[11] Each of the statutes retained a structure similar or identical to the Gonzalez Act, and each included a provision like Section 1089(e) making Section 2680(h) inapplicable to alleged malpractice committed within the scope of government employment.

IV. CONGRESS HAD GOOD REASONS TO TREAT MEDICAL BATTERY THE SAME AS OTHER MEDICAL MALPRACTICE CLAIMS IN THE GONZALEZ ACT

Given the exceptionally close relationship between medical battery and other medical malpractice actions, Congress's decision in the Gonzalez Act to permit medical battery claims to be brought against the government and therefore treated like

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[11] Just as medical battery is very closely related to other forms of medical malpractice, see pp. 34-36, *infra*, "misrepresentation" – another tort included in Section 2680(h) – is very closely related to many instances of legal malpractice. Thus, just as Congress enacted Section 1089(e) and the analogous medical statutes to transfer all forms of medical malpractice liability, including liability for medical battery, from the employee to the government, Congress enacted Section 1054(e) to transfer all liability for legal malpractice from the employee to the government. See *Mossow ex rel. Mossow v. United States*, 987 F.2d 1365, 1370-1371 (8th Cir. 1993) (rejecting government argument that plaintiffs' legal malpractice claim is precluded by 28 U.S.C. 2680(h) exclusion for "misrepresentation," on ground that Section 1054(e) makes Section 2680(h) inapplicable); *Devlin v. United States*, 352 F.3d 525, 536 (2d Cir. 2003). The same conclusion applies to fiduciary liability that is covered by 5 U.S.C. 8477, which similarly may involve a claim of misrepresentation that, without Section 8477(e), would be barred by Section 2680(h).

other medical malpractice claims made sense. The alternative adopted by the court of appeals, which would require courts to distinguish between medical negligence claims (which can be brought under the FTCA against the government) and medical battery claims (which are barred altogether), would entangle courts in confusion and entirely deprive victims of remedies based on fine differences in pleading rules in the different States. In the end, it would eliminate remedies for many of the victims who appeared to be most deserving.

A. State Laws Impose Widely Varying Rules on Consent-Based Medical Tort Claims

Most states recognize three types of consent-based claims that can be brought against doctors and other medical personnel – informed consent, revoked consent, and no consent. Informed consent claims address situations where, although the patient consented to the procedure, the doctor did not convey adequate information to the patient to make the patient's consent an "informed" one. See, *e.g.*, *Willis v. Bender*, 596 F.3d 1244, 1254 (10th Cir. 2010). Claims of revoked consent occur where the patient tries to revoke prior consent to a procedure but the doctor performs the procedure anyway. See, *e.g.*, *Mims v. Boland*, 138 S.E.2d 902, 907 (Ga. Ct. App. 1964) (describing circumstances under which a doctor could be liable for continuing a procedure after consent has been revoked). Lack of consent claims commonly address situations where the doctor did not obtain any consent at all for the procedure that he or she performed. See, *e.g.*, *Willis*, 596 F.3d at 1254.

Originally, all medical consent claims were treated as battery claims, on the theory that touching of the body without the patient's consent is a technical battery. *See* Jennifer A. Stiller, Health Law Practice Guide § 1:13 (2012). Most States have since moved towards treating informed consent claims as negligence-based, on the theory that the doctor has behaved negligently in failing to disclose sufficient information to the patient at the time the patient consented to the operation. *See, e.g., Curran v. Buser*, 711 N.W.2d 562, 568 (Neb. 2006). Two States, however, appear to permit plaintiffs to bring informed consent claims either as negligence-based or battery-based claims, see *Brown v. Wood*, 202 So. 2d 125, 130 (Fla. Dist. Ct. App. 1967); *Congrove v. Holmes*, 308 N.E.2d 765, 770-71 (Ohio Ct. Com. Pl. 1973), and at least two States still require *all* informed consent claims to be brought as battery claims, see *Fitzpatrick v. Natter*, 961 A.2d 1229, 1241 n.13 (Pa. 2008); *Cary v. Arrowsmith*, 777 S.W.2d 8, 21 (Tenn. Ct. App. 1989); see also *Foster v. Traul*, 175 P.3d 186, 192 (Idaho 2007); *Montgomery v. Bazaz-Sehgal*, 798 A.2d 742, 748 (Pa. 2002).

Revoked consent claims are comparatively rarer. Of the jurisdictions that have addressed them, at least nine have classified them as battery-based.[12] Wisconsin, however, treats them as negligence-based, identically to informed-consent claims. See *Schreiber v. Physicians Ins. Co. of Wis.*, 588 N.W.2d

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[12] See *Pallacovitch v. Waterbury Hosp.*, No. CV126013332, 2012 WL 3667310, at *3 (Conn. Super. Ct. Aug. 3, 2012) (identifying seven other jurisdictions in addition to Connecticut); *Meyers v. Epstein*, 232 F. Supp. 2d 192, 198 (S.D.N.Y. 2002) (discussing New York law).

26, 33 (Wis. 1999). South Carolina requires all medical consent-based claims, including revoked consent claims, to be brought under the State's negligence-based medical malpractice framework. *Linog v. Yampolsky*, 656 S.E.2d 355, 358 (S.C. 2008).

Lack of consent claims in most States are medical battery claims. See, *e.g.*, *Howard v. Univ. of Med. and Dentistry of N.J.*, 800 A.2d 73, 80 (N.J. 2002). Nevertheless, at least two States do not recognize medical battery claims as intentional torts at all, and thus require that they be brought as negligence-based claims. See *Lugenbuhl v. Dowling*, 701 So. 2d 447, 453 (La. 1997) (rejecting "battery-based liability in lack of informed consent cases (which include no-consent cases)"); *Linog*, 656 S.E.2d at 358. Some other States treat medical battery the same as common-law battery. See, *e.g.*, *Duncan v. Scottsdale Med. Imaging, Ltd.*, 70 P.3d 435, 438 (Ariz. 2003) (en banc); *In re A.C.*, 573 A.2d 1235, 1243 (D.C. 1990); *In re Gardner*, 534 A.2d 947, 951 (Me. 1987). Some states differentiate between medical battery (an intentional tort) and medical malpractice, which they view as including all negligence-based medical claims. See, *e.g. Yoder v. Cotton*, 758 N.W.2d 630, 635 (Neb. 2008) (noting that "[b]attery committed by a physician has been distinguished from claims of medical malpractice").

B. The Court of Appeals' Conclusion Would Require Courts To Enforce Arbitrary Distinctions and Disserve Congress's Intent

Under the scheme of Section 1089(e), the niceties of state law and the fine distinctions discussed above have little effect on the basic question whether some

remedy is available for consent-based malpractice claims. Consent-based malpractice claims are treated the same as other traditional malpractice claims; a remedy against the government – and not the doctor – is available for all of them. Moreover, within the category of consent-based malpractice claims, courts need not wrestle with outcome-determinative inquiries into the fine points of classification adopted under various state laws; the FTCA remedy is available for all such claims, just as it is for other malpractice claims.

1. The court of appeals' construction of Section 1089(e) would undo those beneficial effects. Despite the fact that the conduct itself would be tortious in *every* State, the question whether the victim of a medical battery by an armed forces doctor has a remedy at all would turn on precisely how claims were pleaded, on the application of often indeterminate rules of state law distinguishing between various types of consent-based claims, and on the accident of which State's law governs the case in question. See 28 U.S.C. 1346(b)(1) ("law of the place where the act or omission occurred").

2. The court of appeals' result would preclude *all* remedies for a class of tort victims that Congress could not have intended to disfavor. "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault, for which he is liable in damages." *Shloendorff v. Soc'y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914) (Cardozo, J.). Consent-based medical torts may involve serious in-

cursions on bodily integrity, as occurred in this case. See, *e.g.*, *Guin v. Sison*, 552 So. 2d 60, 61-62 (La. Ct. App. 1989) (consent given only for abdominal exploration and possible colectomy, but doctor also removed ovary and Fallopian tube he believed to be contributing to patient's condition); *Bazaz-Sehgal*, 798 A.2d at 745 (unwanted implantation of prosthesis during surgery); *Blanchard v. Kellum*, 975 S.W.2d 522, 523 (Tenn. 1998) (attempted extraction of all teeth without consent to full extraction). They may also involve failures by medical professionals to provide crucial information that would enable patients to make informed decisions about their own medical treatment; in some jurisdictions, such cases must be pleaded as batteries. See, *e.g.*, *Fitzpatrick*, 961 A.2d at 1241 n.13; *Friter v. Iolab Corp.*, 607 A.2d 1111, 1111-1112 (Pa. Super. Ct. 1992) (patient not told lens implanted in eye was experimental); *Shadrick v. Coker*, 963 S.W.2d 726, 729 (Tenn. 1998) (doctor failed to inform patient that screws being inserted into spine were experimental). In medical consent cases, tort remedies have long provided remedies for victims and incentives for medical professionals to observe appropriate standards. Under the court of appeals' decision, patients of doctors employed by the armed forces and the other specified agencies would be left entirely without those protections.

3. Moreover, while state law generally provides some protection for victims of the whole range of consent-based medical torts, victims of consent-based medical torts committed by government medical personnel of the specified agencies would find remedies distributed arbitrarily. For example, in

Pennsylvania and Tennessee, where *all* consent-based medical torts must be pleaded as batteries, victims of all consent-based medical torts would presumably be left entirely without redress. In other States, in which some consent-based torts can (or must) be pleaded as negligence, the availability of a remedy would depend on the court correctly sorting out the proper categorization. Victims of perhaps the most severe consent-based torts – a doctor's intentional performance of a procedure to which the patient has given no consent, as in *Guin*, *supra* – would in most States be left entirely without redress.

4. There is no reason why Congress would have wanted to distinguish this one class of medical malpractice victims and leave them entirely without a remedy for what could be very serious wrongs. Indeed, under the Gonzalez Act, this class of victims likely includes veterans like petitioner and families of those serving in the armed forces whom this Court has recognized are uniquely the subject of congressional solicitude for their service to our country. See, *e.g.*, *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991) ("[P]rovisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor."); *Fishgold v. Sullivan Dry Dock & Repair Corp.*, 328 U.S. 275, 285 (1946) (legislation affecting veterans "is to be liberally construed for the benefit of those who left private life to serve their country"). The court of appeals' conclusion that Congress intended to leave this class of victims without the remedies ordinarily available to every other victim in our society is particularly misguided, and it should be rejected.

V. PETITIONER'S READING OF SECTION 1089(e) COMPORTS WITH THIS COURT'S TEACHINGS ON WAIVERS OF SOVEREIGN IMMUNITY

In concluding that petitioner's "plausible" reading of Section 1089(e) had to be rejected, Pet. App. 6a, the court of appeals relied heavily on its view that petitioner's reading requires "an unequivocal waiver of [sovereign] immunity." Pet. App. 9a. This Court has explained, however, that no such "unequivocal waiver" is necessary when, as here, the issue is the scope of an exception to the FTCA. Moreover, even if a strict construction rule applied, the evidence that Section 1089(a) abrogates the intentional tort exception for acts specified in the Gonzalez Act would satisfy it.

A. The Court of Appeals Erred in Applying a Rule of "Unequivocal Waiver"

1. The Federal Tort Claims Act waives the Government's immunity from suit in clear, "sweeping" language. *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 491-92 (2006) (quoting *United States v. Yellow Cab Co.*, 340 U.S. 543, 547 (1951)); see also *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992). Accordingly, the construction of the scope of exceptions to that "broad waiver of sovereign immunity," *Kosak v. United States*, 465 U.S. 848, 852 (1984), does not "implicate the general rule that 'a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign.'" *Dolan*, 546 U.S. at 491-92 (quoting *Lane v. Pena*, 518 U.S. 187, 192 (1996)). That is because "unduly generous interpretations of the exceptions

run the risk of defeating the central purpose of the statute." *Id.* at 492 (quoting *Kosak*, 465 U.S. at 853 n.9). Instead, "the proper objective of a court attempting to construe one of the subsections of 28 U.S.C. § 2680 is to identify 'those circumstances which are within the words and reason of the exception' – no less and no more.'" *Ibid.* (quoting *Kosak*, 465 U.S. at 853 (quoting *Dalehite v. United States*, 346 U.S. 15, 31 (1953))). The Court has applied that approach in numerous cases construing both the scope of Section 2680 exceptions and other aspects of the FTCA.

For example, in *Dolan*, the Court considered whether a claim for injuries incurred when the plaintiff tripped over some mail left on her porch was barred by 28 U.S.C. 2680(b), the FTCA exception for "[a]ny claim arising out of the . . . negligent transmission of letters or postal matter." The Court noted that the words of Section 2680(b), taken by themselves, could extend to a claim like the plaintiff's, 546 U.S. at 486, and could therefore bar her suit. Under the court of appeals' "unequivocal waiver" standard, that would have been sufficient to resolve the case. Instead, however, this Court employed ordinary tools of statutory construction – "reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis," *ibid.* – to conclude that a "narrower reading" of the postal exception was appropriate, under which "negligent transmission" did *not* extend to the plaintiff's claim. *Ibid.*

Regardless of whether the Court held for the

plaintiff or the United States, each of the other cases in which the Court has addressed an FTCA exception has similarly applied the ordinary tools of statutory construction to determine the scope of the exception, without applying or in most cases even referring to any special "unequivocal waiver" rule. See, *e.g.*, *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 217-28 (2008) (Section 2680(c) customs exception); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 700-12 (2004) (Section 2680(k) "foreign country" exception); *Smith v. United States*, 507 U.S. 197, 203 (1993) (same); *Kosak*, 465 U.S. at 851-855 (Section 2680(c) customs exception); *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808-12 (1984) (Section 2680(a) discretionary function exception).

2. Even aside from FTCA exceptions, the Court has construed the FTCA without applying an "unequivocal waiver" requirement. As the Court explained in *United States v. Kubrick*, which involved the FTCA statute of limitations, "we should not take it upon ourselves to extend the waiver beyond that which Congress intended," but "[n]either . . . should we assume the authority to narrow the waiver that Congress intended." 444 U.S. 111, 117-118 (1979). See, *e.g.*, *United States v. Olson*, 546 U.S. 43 (2005) (construing FTCA requirement that government be held liable only in situations where state law would make a private person liable in tort); *Molzof v. United States*, 502 U.S. 301 (1992) (defining the scope of the FTCA's prohibition on the award of "punitive damages"); *United States v. Muniz*, 374 U.S. 150 (1963) (holding that the FTCA extends to applicable claims by federal prisoners, based on the text, legis-

lative history, and purpose of the statute).

3. Because the issue in this case is closely analogous to the issues in the above cases, no rule of "unequivocal waiver" applies. As in those cases, the broad FTCA waiver of immunity in 28 U.S.C. 1346 and 2674 is in place, and its interpretation is not in question. As in many of those cases, this case turns on the application of an exception to the FTCA – here, the Section 2680(h) intentional tort exception, as modified by Section 1089(e) for a particular class of cases (those involving medical personnel of the specified agencies). The question whether, as applied to claims covered by the Gonzalez Act, that exception leaves the victims of medical battery remediless is one that should be answered, as this Court's cases have instructed, by identifying the "words and reason" of the statutes involved – no less and no more.

B. In Any Event, Construing Section 1089(e) to Permit FTCA Suits in these Circumstances Satisfies Any Strict Construction Rule that Would Be Applied

Even if a rule of strict construction applied, Section 1089(e) would permit FTCA suits for medical battery and other intentional torts. While such a strict construction rule requires more certainty before concluding that Congress waived sovereign immunity, it does not prohibit the use of the ordinary tools of statutory construction to determine if Congress's intent was clear. For example, in a case construing the waiver of sovereign immunity in the Privacy Act, the Court discussed the use of strict construction. The Court explained that, "[a]lthough this

canon of interpretation requires an unmistakable statutory expression of congressional intent to waive the Government's immunity, Congress need not state its intent in any particular way. [The Court has] never required that Congress use magic words." *FAA v. Cooper*, 132 S. Ct. 1441, 1448 (2012). "To the contrary, [the Court has] observed that the sovereign immunity canon 'is a tool for interpreting the law' and that it does not 'displac[e] the other traditional tools of statutory construction.'" *Ibid.* (quoting *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589 (2008)). When strictly construing a waiver, "[w]hat [the Court] thus require[s] is that the scope of Congress' waiver be clearly discernable from the statutory text in light of traditional interpretive tools. If it is not, *then* [the Court] take[s] the interpretation most favorable to the Government." *Ibid.* (emphasis added).

For the reasons given above, it is "clearly discernable" from the text, as well as the other traditional tools of statutory construction, that Section 1089(e) eliminates the FTCA exception for medical battery (and other intentional torts) committed by covered medical personnel, based on Congress's determination that it made sense to treat such cases the same as other medical malpractice cases. To require an even more explicit expression of Congress's intent, in the face of the text of Section 1089(e) and all of the other evidence above, would be to disregard Congress's intent in order to achieve an exceptionally harsh result that serves no sound purpose.

VI. THIS COURT'S DECISION IN *SMITH* DOES NOT SUPPORT THE COURT OF APPEALS' CONCLUSION

As explained above, the Gonzalez Act is based on the premise that victims of traditional torts will have remedies, either against the government under the FTCA or against the tortfeasor-employees. The court of appeals, supported by the government, erred in finding that this Court "expressly rejected an identical argument in [*United States v.*] *Smith*, [499 U.S. 160 (1991)]." Pet. App. 12a; see BIO 11. *Smith* involved a different statute with different provisions, a different structure, a different history, and different purposes. Nothing in *Smith* casts doubt on the conclusion that the Gonzalez Act preserves a remedy for victims of medical battery, as for victims of other forms of medical malpractice.

1. *Smith* arose from a claim against an army doctor for malpractice that occurred in a foreign country. The plaintiff did not sue the government, because the FTCA exception for suits arising in foreign countries, 26 U.S.C. 2680(k), precluded it. Although the government had originally relied on the Gonzalez Act in arguing that the doctor could not be sued, the government thought better of that argument and abandoned it in the court of appeals. See *Smith*, 499 U.S. at 164 n.6; see also pp. 15-16, *supra*. As the case came to this Court, it involved a post-Gonzalez Act federal statute, the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Liability Reform Act), 28 U.S.C. 2679(b)(1). That Act generally provides that FTCA suits against the government are the exclusive remedy for torts committed by government employees within the scope of their

employment, and the case presented the question whether the Liability Reform Act precluded the suit against the doctor, notwithstanding the unavailability of an FTCA suit. The Court held that it did.

2. The Liability Reform Act differs substantially from the Gonzalez Act. The Liability Reform Act contains no analogue to Section 1089(e), or to the Gonzalez Act's indemnification or removal provisions. To the contrary, while those provisions demonstrate that Congress intended the Gonzalez Act *not* to preclude suits against the employee when the FTCA remedy is unavailable, the absence of those provisions permitted an alternative reading of the Liability Reform Act in *Smith*.

Equally important, the Court in *Smith* expressly and exclusively based its decision on two provisions in the Liability Reform Act that have no analogue in the Gonzalez Act. 499 U.S. at 166. One of them provides that suits in which the United States is substituted as a defendant under the Liability Reform Act "shall proceed in the same manner as any action against the United States filed pursuant to [the FTCA] *and shall be subject to the limitations and exceptions applicable to those actions.*" 28 U.S.C. 2679(d)(4) (emphasis added). The Court found that the "limitations and exceptions" clause – which is not present in the Gonzalez Act – demonstrates Congress's intent that plaintiffs within the scope of the Section 2680 exclusions would be left without a remedy. *Smith*, 499 U.S. at 166.

The "second basis of [the Court's] interpretation" in *Smith* was an "express preservation[] of employee liability" for *Bivens* actions or actions under other

federal statutes that authorize suit against a government employee. 499 U.S. at 166; see *id.* at 167 (citing 28 U.S.C. 2679(b)(1) and (2)). The Court reasoned that "Congress' express creation of these two exceptions convinces us that [the court of appeals] erred in inferring a third exception that would preserve tort liability for Government employees when a suit is barred under the FTCA." *Ibid.* Again, there is no analogue in the Gonzalez Act to the *Bivens* and other-statute exceptions in the Liability Reform Act.

3. Far from casting any doubt on reading the Gonzalez Act to preserve *some* remedy for traditional tort violations, the Court in *Smith* stated that it "need not question the lower court's determination that the Gonzalez Act would *not* immunize [the doctor] from a malpractice action brought under state or foreign law" *i.e.*, a case that would be barred against the government under an FTCA exception. 499 U.S. at 172 (emphasis added).[13] *Smith* accordingly has no bearing on the interpretation of the Gonzalez Act in general, or on Section 1089(e) – a provision not at issue in *Smith* – in particular.

4. Finally, the court of appeals attempted to find support in this Court's comment in *Smith* that the Gonzalez Act "functions *solely* to protect military medical personnel from malpractice liability." Pet. App. 5a (quoting *Smith*, 499 U.S. at 172, and adding emphasis); see also BIO 8. The Court made that comment in rejecting a contention that the Gonzalez

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[13] See also *Hui v. Castaneda*, 130 S. Ct. 1845, 1854 & n.10 (2010) (similarly reserving question whether "an injured party without a remedy under the FTCA may sue a PHS official directly" under a statute analogous to the Gonzalez Act).

Act itself *created* a remedy against the employee in *Smith* – a claim that is not made here, where the issue is whether Section 1089(e) removes an exception to a remedy created by the FTCA elsewhere. The Court in *Smith* did not purport to consider other purposes of the Gonzalez Act, such as providing under Section 1089(f) for instances in which an FTCA remedy is unavailable and the individual employee is sued – or providing under Section 1089(e) for eliminating medical battery suits against employees by eliminating an FTCA exception that would otherwise bar such suits. Accordingly, nothing in *Smith* detracts from the conclusion that the Gonzalez Act abrogates the intentional tort exception for claims covered by it, thereby permitting the victims of those torts their remedy under the FTCA.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

STEPHANOS BIBAS
NANCY BREGSTEIN GORDON
UNIV. OF PENNSYLVANIA LAW SCHOOL SUPREME COURT CLINIC
3501 SANSOM STREET
PHILADELPHIA, PA 19104

IRVING L. GORNSTEIN
GEORGETOWN UNIV. LAW CENTER
600 NEW JERSEY AVE. N.W.
WASHINGTON, D.C. 20001

JAMES A. FELDMAN
Counsel of Record
5335 WISCONSIN AVE. N.W.
SUITE 440
WASHINGTON, D.C. 20015
(202) 730-1267
WEXFELD@GMAIL.COM

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APPENDIX

1. 10 U.S.C. 1089 provides:

§ 1089. Defense of certain suits arising out of medical malpractice

(a) The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the armed forces, the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, the Department of Defense, the Armed Forces Retirement Home, or the Central Intelligence Agency in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of his duties or employment therein or therefor shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) whose act or omission gave rise to such action or proceeding. This subsection shall also apply if the physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) involved is serving under a personal services contract entered into under section 1091 of this title.

(b) The Attorney General shall defend any civil action or proceeding brought in any court against

any person referred to in subsection (a) of this section (or the estate of such person) for any such injury. Any such person against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon such person or an attested true copy thereof to such person's immediate superior or to whomever was designated by the head of the agency concerned to receive such papers and such person shall promptly furnish copies of the pleading and process therein to the United States attorney for the district embracing the place wherein the action or proceeding is brought, to the Attorney General and to the head of the agency concerned.

(c) Upon a certification by the Attorney General that any person described in subsection (a) was acting in the scope of such person's duties or employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought against the United States under the provisions of title 28 and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State court.

(d) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 of title 28, and with the same effect.

(e) For purposes of this section, the provisions of section 2680(h) of title 28 shall not apply to any cause of action arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations).

(f)(1) The head of the agency concerned may, to the extent that the head of the agency concerned considers appropriate, hold harmless or provide liability insurance for any person described in subsection (a) for damages for personal injury, including death, caused by such person's negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of such person's duties if such person is assigned to a foreign country or detailed for service with other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 1346(b) of title 28, for such damage or injury.

(2) With respect to the Secretary of Defense and the Armed Forces Retirement Home Board, the authority provided by paragraph (1) also includes the authority to provide for reasonable attorney's fees for persons described in subsection (a), as determined necessary pursuant to regulations prescribed by the head of the agency concerned.

(g) In this section, the term "head of the agency concerned" means --

(1) the Director of the Central Intelligence Agency, in the case of an employee of the Central Intelligence Agency;

(2) the Secretary of Homeland Security, in the case of a member or employee of the Coast Guard when it is not operating as a service in the Navy;

(3) the Chief Operating Officer of the Armed Forces Retirement Home, in the case of an employee of the Armed Forces Retirement Home; and

(4) the Secretary of Defense, in all other cases.

2. 28 U.S.C. 1346(b) provides:

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United

States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

3. 28 U.S.C. 2674 provides in pertinent part:

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * * *

4. 28 U.S.C. 2679 provides in pertinent part:

§ 2679. Exclusiveness of remedy

* * * * *

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government--

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of

this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is

filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if--

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

5. 28 U.S.C. 2680 provides:

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to --

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if --

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[**(g)** Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious

prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.